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Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—G. W. HEMMING, Q.C.

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A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Arnison *v.* Smith – – 98, 348
Australian Wine Importers, Limited, *In re* – – – 278
Avis *v.* Newman. *In re* Cartwright – – – – 532
Ayscough *v.* Bullar – – 341

B.

Bainbridge *v.* Smith – – 462
Batten *v.* Gedye – – – 507
Bingham, Presland *v.* – – 268
Birley, Clarke *v.* – – – 422
Blaker *v.* Herts and Essex Waterworks Company – – 399
Blakey *v.* Latham – – – 518
Bolton Partners *v.* Lambert – 295
Boulton, Whytehead *v.* *In re* Bowman. *In re* Lay – – 525
Bourgoise, *In re* – – – 310
Bowman, *In re.* *In re* Lay. Whytehead *v.* Boulton – 525
Bright *v.* Campbell – – 388
Brooks, Lumley *v.* – – – 323
Broxburn Oil Company, Burland *v.* *In re* Burland's Trade-mark – – – – 542
Buckley *v.* Royal National Life Boat Institution. *In re* David 168
Bullar, Ayscough *v.* – – 341
Burke, Robinson *v.* *In re* Phillips – – – – – 417
Burland *v.* Broxburn Oil Company. *In re* Burland's Trade-mark – – – – 542
Burland's Trade-mark, *In re.* Burland *v.* Broxburn Oil Company – – – – – 542

C.

Campbell, Bright *v.* – – 388
Cardigan *v.* Curzon-Howe – 375
Cartwright, *In re.* Avis *v.* Newman – – – – – 532
Clarke *v.* Birley – – – 422
Clayton *v.* Leech – – – 103
Cohen, Edevain *v.* – – – 563
Cole *v.* Park. *In re* Park – 326

PAGE

Cooper-Dean *v.* Stevens. *In re* Dean – – – – – 552
Criterion Gold Mining Company, *In re* – – – – – 146
Curzon-Howe, Cardigan *v.* – 375

D.

Dallas *v.* Towry. *In re* Towry's Settled Estate – – – 64
Dangar's Trusts, *In re* – – 178
David, *In re.* Buckley *v.* Royal National Life Boat Institution 168
Davis *v.* Starr – – – 242
Dawson, *In re.* Johnston *v.* Hill 415
Dean, *In re.* Cooper-Dean *v.* Stevens – – – – 552
De Burgh Lawson, *In re.* De Burgh Lawson *v.* De Burgh Lawson – – – – 568
——————— *v.* De Burgh Lawson. *In re* De Burgh Lawson – – – – 568
Dreyfus *v.* Peruvian Guano Company – – – – – 151
Duncan *v.* Lawson – – – 394
Dunn's Trade-marks, *In re* – 439

E.

Eardley *v.* Knight – – – 537
Edevain *v.* Cohen – – – 563
Edison and Swan Electric Light Company *v.* Holland – – 28
Eland *v.* Medland. *In re* Medland – – – – – 476

F.

Fontaine's Case. *In re* Howe Machine Company – – 118

G.

Gedye, Batten *v.* – – – 507
Gissing, Morrell *v.* *In re* W. Roper's Estate – – – 409

H.

PAGE

Hancock *v.* Smith – – – 456
Hanly, *Ex parte.* *In re* Skegness and St. Leonards Tramways Company, *In re* – – 215
Hart, *In re.* *Ex parte* School Board for London – – 547
Heaver, Lowther *v.* – – 248
Heppenstall Brothers, Holliday *v.* – – – – – – 109
Herts and Essex Waterworks Company, Blaker *v.* – – 399
Hill, Johnston *v.* *In re* Dawson 415
Hoblyn *v.* Hoblyn – – – 200
Holland, Edison and Swan Electric Light Company *v.* – 28
Holliday *v.* Heppenstall Brothers 109
Howe Machine Company, *In re.* Fontaine's Case – – – 118

J.

Johnston *v.* Hill. *In re* Dawson 415
Jones, Lloyd & Co., Limited, *In re* – – – – – 159
Joule's Trade-marks, *In re.* Thompson *v.* Montgomery – 35

K.

Kilvert, Robinson *v.* – – 88
Knight, Eardley *v.* – – 537

L.

Lambert, Bolton Partners *v.* – 295
Latham, Blakey *v.* – – – 518
Lawson, Duncan *v.* – – 394
Lay, *In re.* *In re* Bowman. Whytehead *v.* Boulton – – 525
Lee *v.* Neuchatel Asphalte Company – – – – – 1
Leech, Clayton *v.* – – – 103
Lowther *v.* Heaver – – 248
Luce, Tomlin *v.* – – – 573
Lumley *v.* Brooks – – – 323

M.

Mainland *v.* Upjohn – – 126

PAGE

Martin (a Lunatic), *In re* – 381
Medland, *In re*. Eland *v.* Medland – – – – – 476
———, Eland *v.* *In re* Medland – – – – – 476
Montgomery, Thompson *v.* *In re* Joule's Trade-marks – 35
Morrell *v.* Gissing. *In re* W. Roper's Estate – – – 409

N.

Neuchatel Asphalte Company, Lee *v.* – – – – 1
Newman, Avis *v.* *In re* Cartwright – – – – 532

P.

Park, *In re*. Cole *v.* Park – 326
——, Cole *v.* *In re* Park – 326
Peruvian Guano Company, Dreyfus *v.* – – – – 151
Phillips, *In re*. Robinson *v.* Burke – – – – 417
Presland *v.* Bingham – – 268

R.

Robinson *v.* Burke. *In re* Phillips – – – – – 417
——— *v.* Kilvert – – 88
Roper's (W.) Estate, *In re*. Morrell *v.* Gissing – – – 409
Royal National Life Boat Institution, Buckley *v.* *In re* David – – – – 168

S.

PAGE

School Board for London, *Ex parte*. *In re* Hart – – 547
Skegness and St. Leonard's Tramways Company, *In re*. *Ex parte* Hanly – – – 215
Smith, Arnison *v.* – – 98, 34
——, Bainbridge *v.* – – 46
——, Hancock *v.* – – – 45
Starr, Davis *v.* – – – 24
Stevens, Cooper-Dean *v.* *In re* Dean – – – – 55
Stewart, *In re* – – – 49

T.

Thompson *v.* Montgomery. *In re* Joule's Trade-marks – 3
Tomlin *v.* Luce – – – 573
Towry, Dallas *v.* *In re* Towry's Settled Estate – – – 6
Towry's Settled Estate, *In re*. Dallas *v.* Towry – – – 6

U.

Upjohn, Mainland *v.* – – 12

W.

Whytehead *v.* Boulton. *In re* Bowman. *In re* Lay – –

Y.

Yeadon Local Board and Yeadon Waterworks Company, *In re* Yeadon Waterworks Company and Yeadon Local Board, *In re* 5

TABLE OF CASES CITED.

A.

		PAGE
Abbott *v.* Middleton	7 H. L. C. 68	527
Abercorn's (Lord) Case	10 W R. 451, 548	356
Adamson's Case	Law Rep. 18 Eq. 670	162
Adlam *v.* Colthurst	Law Rep. 2 A. & E. 30	512
Alexander *v.* Mills	Law Rep 6 Ch. 124	376
Allen, In re	34 Ch. D. 433	498
——— *v.* Jarvis	Law Rep. 4 Ch. 616	326
——— *v.* Richardson	13 Ch. D. 524	107
Almada and Tirito Company, In re	38 Ch. D. 415	12
Ambrose Lake Tin and Copper Mining Company, In re	14 Ch. D. 390	8
Ancona *v.* Marks	7 H. & N. 686	297
Anderson *v.* May	2 B. & P. 237	326
Anglo-Danubian Steam Navigation and Colliery Company, In re	Law Rep. 20 Eq. 339	134
Anon.	2 Ves. Sen. 451	153
———	1 Bulstr. 20	511
———	1 Vent. 127	513
Arkwright *v.* Newbold	17 Ch. D. 301	354
Arnold's Trusts, In re	Law Rep. 10 Eq 252	531
Askew *v.* Askew	57 L. J. (Ch.) 629	409
Attorney-General *v.* Jones	1 Mac. & G. 574	172
——— *v.* Lawes	8 Hare, 32	79
——— *v.* Nethercote	11 Sim. 529	539
——— *v.* Whorwood	1 Ves. Sen. 534	555
Attree *v.* Hawe	9 Ch. D. 337	172

B.

Bagon *v.* Smith	1 Q B. 345	535
Badeley *v.* Consolidated Bank	38 Ch. D. 238	457
Badger *v.* Gregory	Law Rep. 8 Eq. 78	527
Bailey, In re	12 Ch. D. 268	570
Ball *v.* Ray	Law Rep. 8 Ch. 467	92
Bandy *v.* Cartwright	8 Ex. 913	91
Barnes *v.* Dowling	44 L. T. (N.S.) 809	535
Barrett *v.* Hartley	Law Rep. 2 Eq. 789	132
Barrow-in-Furness and Northern Counties Land and Investment Company, In re	14 Ch. D. 400	162
Batten *v.* Wedgwood Coal and Iron Company	31 Ch. D. 346	183
Bear *v.* Stevenson	30 L. T (N.S) 177	353
Beck, In re	24 Ch. D. 608	376
Beck's Trusts, In re	16 W. R. 189	531

		PAGE
Beckwith *v.* Beckwith	25 W. R. 282; 46 L. J. (Ch.) 97	527
Bellamy *v.* Sabine	2 Ph. 425	202
Benn, In re	29 Ch. D. 839	527
Bent *v.* Young	9 Sim. 180	151
Bentley, Ex parte	12 Ch. D. 850	165
Bernard *v.* Simpson	Clay. Rep. 138	550
Besley *v.* Besley	9 Ch. D. 103	103
Bird *v.* Brown	4 Ex. 786	297
Birmingham and Lichfield Junction Railway Company, In re	28 Ch. D. 652	230
Bloxam *v.* Metropolitan Railway Company	Law Rep. 3 Ch. 337	6
Boston Deep Sea Fishing and Ice Company *v.* Ansell	39 Ch. D. 339	304
Boyes *v.* Cook	14 Ch. D. 53	418
Bradshaw's Arbitration, In re	12 Q. B. 562	56
Braham *v.* Beachim	7 Ch. D. 848	38
Brandreth's Trade-mark, In re	9 Ch. D. 618	293
Brewer *v.* Broadwood	22 Ch. D. 105	298
Bridges *v.* Strachan	8 Ch. D. 558	70
Broad *v.* Selfe	11 W. R. 1036; 9 Jur. (N.S.) 885	126, 132
Broder *v.* Saillard	2 Ch. D. 692	343
Brook *v.* Hook	Law Rep. 6 Ex. 89	297
Brown *v.* Burdett	21 Ch. D. 667	555
Bryon *v.* Metropolitan Saloon Omnibus Company	4 Drew. 546	520
Buckle *v.* Bristow	10 Jur. (N.S.) 1095	555
Burrow *v.* Scammell	19 Ch. D. 175	105
Burstall *v.* Beyfus	26 Ch. D. 35	155

C.

Capel *v.* Sim's Ships' Composition Company	58 L. T. (N.S.) 807	358
Carden *v.* General Cemetery Company	5 Bing. (N.C.) 253	229
Cargill *v.* Bower	10 Ch. D. 502	353
Carrington (Lord) *v.* Payne	5 Ves. 404	64
Carswell *v.* Hyland	3 Times L. R. 708	343
Challoner *v.* Murhall	2 Ves. 524	547
Chambers *v.* Goldwin	9 Ves. 254	137
Champneys *v.* Arrowsmith	Law Rep. 2 C. P. 602; 3 C. P. 107	513
Chennell, In re	8 Ch. D. 492	100
Chifferiel, In re	40 Ch. D 45	574
Childers *v.* Childers	1 De G. & J. 482	467
Chinery, Ex parte	12 Q. B. D. 342	123
Christmas, In re	33 Ch. D. 332	168, 172
Clark's Estate, In re	14 Ch. D. 422	418
Clarkson *v.* Henderson	14 Ch. D. 348	134
Clayton's Case	1 Mer. 572	456
Cockburn *v.* Edwards	18 Ch. D. 449	391
Collett *v.* Preston	15 Beav. 458	520
Collette *v.* Goode	7 Ch. D. 842	564
Coltness Iron Company *v.* Black	6 App. Cas. 315	6
Cooke, Ex parte	4 Ch. D. 123	457
——— *v.* Forbes	Law Rep. 5 Eq. 166	89

		PAGE
Cooper, In re	27 Ch. D. 565	376
——— v. Cooper	Law Rep. 7 H. L. 53	396
Corbett's Trusts, Re	Joh. 591	411
Cowdell v. Neale	1 C. B. (N.S.) 332	328
Crears v. Hunter	19 Q. B. D. 341	430
Croome v. Lediard	2 My. & K. 251	140
Cropper v. Smith	26 Ch. D. 700	31
Crossley v. Maycock	Law Rep. 18 Eq. 180	295
Crowe v. Del Rio	9 Sim. 185, n.	151

D.

Dadswell v. Jacobs	34 Ch. D. 278	155
Darley v. Langworthy	3 Bro. P. C. 359	70
Davidson v. Kimpton	18 Ch. D. 213	409
Davies v. Davies	38 Ch. D. 499	535
——— v. Williams	16 Q. B. 546	272
Davison v. Gillies	16 Ch. D. 347, n.	6
De Bay v. Griffin	Law Rep. 10 Ch. 291	337
De Fogassieras v. Duport	11 L. R. Ir 123	398
Dennett v. Atherton	Law Rep. 7 Q. B. 316	92
Dent v. London Tramways Company	16 Ch. D. 344	6
Derby (Earl of) v. Athol (Duke of)	1 Ves. Sen. 202	153
Dickinson v Dodds	2 Ch. D. 463	298
Dicks v. Brooks	13 Ch. D. 652	100
District Bank of London, In re	35 Ch. D. 576	148
Ditton, Ex parte	13 Ch. D. 318	329
Dixon v. Wilkinson	4 De G. & J. 508	190
Doe v. Hicks	8 Bing. 475	70
Douglas, In re	35 Ch. D. 472	555
Duckett v. Gover	6 Ch. D. 82	343
Duckingfield v. Nosworthy	2 Eq. Cas. Ab. 246	153
Du Hourmelin v. Sheldon	4 My. & Cr. 525	395
Dunn v. Green	3 P. Wms. 9	547
—— v. Slee	Holt, N. P. 399	430
Dutton v. Thompson	23 Ch. D. 278	204

E.

East Llangynog Lead Mining Company, In re	23 W. R. 587	119
Eaton v. Swansea Waterworks Company	17 Q. B. 267	273
Ebbw Vale Steel, Iron and Coal Company, In re	4 Ch. D. 827	7
Ecclesiastical Commissioners v. Kino	14 Ch. D. 213	513
Eden v. Weardale Iron and Coal Company	34 Ch. D. 223; 35 Ch. D. 287	31
Edwards v. Dennis	30 Ch. D. 454, 280	444
——— v. Hope	14 Q. B. D. 922	518
Egmont (Earl of) v. Smith	6 Ch. D. 469	302
Ellis v. Selby	1 My. & Cr. 286	555
Emanuel and Simmonds, In re	33 Ch. D. 40	381
Empress Engineering Company, In re	16 Ch. D. 125	430
Etherington v. Wilson	1 Ch. D. 160	511
Evans v. Evans	17 Sim. 86	69
Eyre v. Hughes	2 Ch. D. 148	132
—— v. Marsden	4 My. &. Cr. 231	531
Ezart v. Lister	5 Beav. 585	183

F.

		PAGE
Fane *v.* Fane	Law Rep. 20 Eq. 688	206
Farrar *v.* Farrars	40 Ch. D. 395	575
Ferrao's Case	Law Rep. 9 Ch. 355	162
Field, In re	29 Ch. D. 608	381, 497
Fitch *v.* Weber	6 Hare, 51	320
Flag Lane Chapel *v.* Sunderland (Mayor of)	5 Jur. (N.S.) 894	57
Flight *v.* Thomas	11 A. & E. 688; 8 Cl. & F. 231	273
Forrer *v.* Nash	35 Beav. 167	300
Fothergill's Case	Law Rep. 8 Ch. 270	164
Fowler *v.* Garlike	1 Russ. & My. 232	555
——— *v.* Gaul	3 Rep. Pat. Cas. 247	111
Francis *v.* Collier	4 Russ. 331	70
Frankland *v.* Lucas	4 Sim. 586	191
Fraser *v.* Murdoch	6 App. Cas. 855	480
Frazer *v.* Jordan	8 E. & B. 303	430
Freke *v.* Carbery (Lord)	Law Rep. 16 Eq. 461	395

G.

Gandy *v.* Gandy	30 Ch. D. 57	343, 435
Gardner *v.* Ellis	Law Rep. 4 A. & E. 265	513
——— *v.* London, Chatham and Dover Railway Company	Law Rep. 2 Ch. 201	172, 399
Gedge, In re	14 Beav. 56	329
General Credit and Discount Company *v.* Glegg	22 Ch. D. 549	134
Gentili, In the Goods of	I. R. 9 Eq. 541	395
Gibbs *v.* Rumsey	2 V. & B. 294	555
Gibson *v.* Wells	1 B. & P. N. R. 290	534
Gibson's Trusts, In re	2 J. & H. 656	69
Gifford, Ex parte	6 Ves. 805	430
Glover *v.* Coleman	Law Rep. 10 C. P. 108	273
Goodday *v.* Michell	Cro. Eliz. 441	511
Gort (Viscount) *v.* Rowney	17 Q. B. D. 625	363
Gover's Case	24 W. R. 36	100
Greene *v.* Cole	2 Wms. Saund. 251	534
Greenslade *v.* Darby	Law Rep. 3 Q. B. 421	511
Griffin, Ex parte	14 Ch. D. 37	520
——— *v.* Dighton	5 B. & S. 93	513
Guinness *v.* Land Corporation of Ireland	22 Ch. D. 349	6

H.

Hagedorn *v.* Oliverson	2 M. & S. 485	297
Hall *v.* Ody	2 Bos. & P. 28	520
Hallett's Estate, In re	13 Ch. D. 696	456
Hansard *v.* St. Matthew (Parishioners of)	4 P. D. 46	515
Hardaker *v.* Moorhouse	26 Ch. D. 417	376
Harnett *v.* Maitland	16 M. & W. 257	534
Harrald, In re	52 L. J. (Ch.) 435; 53 L. J. (Ch.) 505	520
Harris *v.* De Pinna	33 Ch. D. 238	273
——— *v.* Watkins	Kay, 438	570
Harrop *v.* Hirst	Law Rep. 4 Ex. 43	511
Hartland *v.* Murrell	27 Beav. 204	570

		PAGE
Harvey's Estate, In re	13 Ch. D. 216	571
Haseldine, In re	31 Ch. D. 511	78
Hawkins *v.* Hamerton	16 Sim. 410	527
Henderson, In re	35 Ch. D. 704; 37 Ch. D. 244	154
——— *v.* Lacon	Law Rep. 5 Eq. 249	353
Hereford and South Wales Wagon and Engineering Company, In re	Law Rep. 17 Eq. 423	148
Herne *v.* Bembow	4 Taunt. 764	534
Heshord *v.* Wills	1 Sid. 454	173
Hester *v.* Hester	34 Ch. D. 607	498
Hitchins *v.* Kilkenny Railway Company	9 C. B. 536	228
Hodge *v.* Foot	34 Beav. 349	527
Hodges *v.* Hodges	20 Ch. D. 749	571
Hogg *v.* Jones	32 Beav. 45	78
Hoghton *v.* Hoghton	15 Beav. 278	202
Holdesworth *v.* Wilson	4 B. & S. 1	56
Home Assurance Association, In re	Law Rep. 12 Eq. 59	148
Hooper *v.* Till	1 Doug. 198	328
Hornby *v.* Cardwell	8 Q. B. D. 329	31
Horner's Estate, In re	19 Ch. D. 186	529
Horsburgh's Application, In re	32 W. R. 530, n.	283, 444
Howard *v.* Maitland	11 Q. B. D. 695	92
Howse *v.* Chapman	4 Ves. 542	173
Hudson's Trade-mark, In re	32 Ch. D. 311	44
Huguenin *v.* Baseley	14 Ves. 273	203
Hulme *v.* Coles	2 Sim. 12	432
Humber Ironworks Company, In re	Law Rep. 2 Eq. 15	147
Hussey *v.* Horne-Payne	4 App. Cas. 311	297
Hutchins' Estate, In re	19 L. R. Ir. 215	411

J.

Jacobson, Ex parte	22 Ch. D. 312	101
James *v.* Kerr	40 Ch. D. 449	126
Jeffrey's Case	5 Rep. 67 a	511
Jelly, Son, and Jones' Application, In re	51 L. J. (Ch.) 639	284
Jenner *v.* Jenner	2 D. F. & J. 359	207
Jennings *v.* Ward	2 Vern. 520	132
Jenour *v.* Jenour	10 Ves. 562	79
Jervis *v.* Lawrence	22 Ch. D. 202	172
Johnson and Weatherall, In re	37 Ch. D. 433	329
——— *v.* Shrewsbury and Birmingham Railway Company	3 D. M. & G. 914	245
Johnston *v.* Orr-Ewing	7 App. Cas. 219	445
Jolland's Case	8 Ves. 72	191
Jones *v.* Ellis	2 Y. & J. 265	511
——— *v.* Hill	7 Taunt. 392	534

K.

Kearsley *v.* Cole	16 M. & W. 128	430
Kellett *v.* Local Board of Health of Tranmere	34 L. J. (Q. B.) 86	55
Kennedy *v.* Panama Royal Mail Company	Law Rep. 2 Q. B. 580	353
Kensington Station Act, In re	Law Rep. 20 Eq. 197	229
Kent's Case	39 Ch. D. 259	159

		PAGE
Kent Tramways Company, In re	12 Ch. D. 312	221
Kirkstall Brewery Company, In re	5 Ch. D. 535	7
Knapp *v.* Williams	4 Ves. 430, n.	168
Knowles *v.* McAdam	3 Ex. D. 23	6

L.

Laird *v.* Briggs	19 Ch. D. 22	258
Lambert *v.* Neuchatel Asphalte Company	30 W. R. 913	13
Langdale *v.* Briggs	21 W. R. 620	69
Lee *v.* Pain	4 Hare, 255	520
—— *v.* Soames	36 W. R. 884	298
Leeds Estate, Building and Investment Company *v.* Shepherd	36 Ch. D. 787	25
Leggott *v.* Barrett	15 Ch. D. 306	366
Leonard and Ellis's Trade-marks, In re	26 Ch. D. 288	43
Linoleum Manufacturing Company *v.* Nairn	7 Ch. D. 834	43
Lippard *v.* Ricketts	Law Rep. 14 Eq. 291	537
Lloyd *v.* Lloyd	2 Sim. (N.S.) 255	554
London and Leicester Hosiery Company *v.* Higham	Lawson on Patents, p. 330	113
London, Chatham, and Dover Railway Company *v.* South Eastern Railway Company	40 Ch. D. 100	245
Love, In re	40 Ch. D. 637	494
Lyell *v.* Kennedy	18 Q. B. D. 796	297

M.

MacAllister *v.* Rochester (Bishop of)	5 C. P. D. 194	31
MacDougall *v.* Knight	W. N. (1887) p. 68	183
Mackenzie and Ascot Gas Company, In re	17 Q. B. D. 114	57
Maclean *v.* Dunn	4 Bing. 722	304
Maden *v.* Taylor	45 L. J. (Ch.) 569	409
Maidman *v.* Malpas	1 Hagg. Cons. 205	512
Manning *v.* London, Worcester, and South Wales Railway Company	17 L. T. (N.S.) 68	228
Manson *v.* Thacker	7 Ch. D. 620	106
Marlborough Club Company, In re	Law Rep. 1 Eq. 216	147
Marriot *v.* Anchor Reversionary Company	2 Giff. 457; 3 D. F. & J. 177	574
Marriott *v.* Tarpley	9 Sim. 279	508
Marris *v.* Ingram	13 Ch. D. 338	119
Marseilles Extension Railway and Land Company, In re	Law Rep. 11 Eq. 151	329
Marsh, In re	38 Ch. D. 630	417
Marshall *v.* Marshall	38 Ch. D. 330	542
Martineau *v.* Briggs	23 W. R. 889	64
——— *v.* Rogers	8 D. M. & G. 328	79
Mason *v.* Harris	11 Ch. D. 97	343
May *v.* Thomson	20 Ch. D. 705	297
Maynard's Case	Law Rep. 9 Ch. 60	163
Melbourne Banking Corporation *v.* Brougham	7 App. Cas. 307	136

		PAGE
Mercer *v.* Graves	Law Rep. 7 Q. B. 499	520
Mills *v.* Northern Railway of Buenos Ayres Company	Law Rep. 5 Ch. 621	6
Milsom *v.* Awdry	5 Ves. 465	529
Mitchell and Izard and the Governor of Ceylon, In re	21 Q. B. D. 408	245
Mitchell *v.* Smith	1 Paige's New York Rep. 287	153
Mitford *v.* Reynolds	1 Sim. 105; 1 Ph. 185	552, 559
Morice *v.* Durham (Bishop of)	10 Ves. 522	555
Morris *v.* Morris	2 Ph. 205	153
Mortimer, In re	54 L. J. (Ch.) 414	409
Myers *v.* Perigal	2 D. M. & G. 599	173

N.

Nacupai Gold Mining Company, In re	28 Ch. D. 65	147
National Funds Assurance Company, In re	10 Ch. D. 118	6
Nevill *v.* Boddam	28 Beav. 554	411
Newbould, In re	20 Q. B. D. 204	498
——— *v.* Bailward	14 App. Cas. 1	384, 498
Nicholson *v.* Revill	4 A. & E. 675	430
Norman, In re	16 Q. B. D. 673	329
North Brazilian Sugar Factories, In re	W. N. 1887, p. 3; 56 L. T. (N.S.) 229	147

O.

Oakeley *v.* Pasheller	10 Bli. (N.S.) 548	431
Odessa Tramways Company *v.* Mendel	8 Ch. D. 235	259
Oriental Financial Corporation *v.* Overend, Gurney, & Co.	Law Rep. 7 Ch. 142	431
Oxford Benefit Building and Investment Society, In re	35 Ch. D. 502	24

P.

Palmer *v.* Johnson	13 Q. B. D. 351	103
Palmer's Trade Mark, In re	24 Ch. D. 504	43
Panama, New Zealand, and Australian Royal Mail Company, In re	Law Rep. 5 Ch. 318	404
Paper Bottle Company, In re	40 Ch. D. 52	147
Parker, In re	59 L. T. (N.S.) 491; W. N. 1888, p. 108	498
——— *v.* Blenkhorn	14 App. Cas. 1	498
——— *v.* Mitchell	11 A. & E. 788	273
——— *v.* Turner	1 Vern. 393	550
Pascoe *v.* Pascoe	3 Bing. N. C. 898	105
Patent Cocoa Fibre Company, In re	1 Ch. D. 617	148
Paul *v.* Roy	15 Beav. 433	153
Peckham Tramways Company, In re	57 L. J. (Ch.) 462	147
Peek *v.* Derry	37 Ch. D. 541	353
Phillips *v.* Silvester	Law Rep. 8 Ch. 173	302
Pickering *v.* Ely (Bishop of)	2 Y. & C. (Ch.) 249	245
Piercy *v.* Young	14 Ch. D. 200	245
Piller *v.* Roberts	21 Ch. D. 198	31

		PAGE
Plews *v.* Baker	Law Rep. 16 Eq. 564	245
Podger's Case	9 Rep. 104 a.	550
Potter *v.* Edwards	26 L. J. (Ch.) 468	126
Potts *v.* Warwick and Birmingham Canal Navigation Company	Kay, 142	172, 406
Powys *v.* Blagrave	4 D. M. & G. 448	535
Preece *v.* Corrie	5 Bing. 24	105
Pulbrook *v.* Richmond Consolidated Mining Company	9 Ch. D. 610	463
Pyman & Co. *v.* Burt	W. N. (1884), p. 100	539

Q.

Quilter, Ex parte	4 De G. & Sm. 183	329
——— *v.* Newton	Carth. 151	514

R.

Raeburn *v.* Andrews	Law Rep. 9 Q. B. 118	119
Rance's Case	Law Rep. 6 Ch. 104	24
Redgrave *v.* Hurd	20 Ch. D. 1	353
Reg. *v.* Arkwright	12 Q. B. 960	513
—— *v.* Stock	8 A. & E. 405	513
Reimer *v.* Salisbury (Marquis of)	2 Ch. D. 378	154
Renals *v.* Cowlishaw	11 Ch. D. 866	343
Reynell *v.* Sprye	1 D. M. & G. 660	366
Richardson *v.* Rusbridger	20 Beav. 136	79
Rickard *v.* Robson	31 Beav. 244	554
Riding *v.* Hawkins	14 P. D. 56	564
Ritchings *v.* Cordingley	Law Rep. 3 A. & E. 113	512
Robarts *v.* Buèe	8 Ch. D. 198	520
Robinson *v.* Grave	21 W. R. 223	91
Roper, In re	39 Ch. D. 482	570
Routh *v.* Thompson	13 East, 274	297

S.

Samuell *v.* Howarth	3 Mer. 272	434
Sanderson *v.* Berwick-upon-Tweed (Mayor of)	13 Q. B. D. 547	91
Savery *v.* King	5 H. L. C. 627	202
Savin *v.* Hoylake Railway Company	Law Rep. 1 Ex. 9	230
Sebright's Settled Estates, In re	33 Ch. D. 429	376
Seddon *v.* Bank of Bolton	19 Ch. D. 462	272
Shaw *v.* Stenton	2 H. & N. 858	91
Shaw's Claim	Law Rep. 10 Ch. 177	221
Siddons *v.* Short	2 C. P. D. 572	91
Siegert *v.* Findlater	7 Ch. D. 801	37, 445
Singer Manufacturing Company *v.* Loog	8 App. Cas. 15	43
——— *v.* Wilson	8 App. Cas. 376	43
Skerratt *v.* North Staffordshire Railway Company	17 L. J. (Ch.) 161	56
Slater *v.* Brookes	9 Dowl. 349	329
—— *v.* Slater	58 L. T. (N.S.) 149	183
Smith *v.* Chadwick	9 App. Cas. 187	353
—— *v.* Edwardes	22 Q. B. D. 10	324

		PAGE
Smith *v.* Osborne	6 H. L. C. 375	530
Snowdon, Ex parte	17 Ch. D. 44	430
Spargo's Case	Law Rep. 8 Ch. 407	161
Spencer, Re	18 W. R. 240; 21 L. T. (N.S.) 808	181
Stead *v.* Mellor	5 Ch. D. 225	556
Steward *v.* North Metropolitan Tramways Company	16 Q. B. D. 556	343, 564
Stewart *v.* West Derby Burial Board	34 Ch. D. 314	511
Stringer's Case	Law Rep. 4 Ch. 475	17
Swain *v.* Ayres	21 Q. B. D. 289	260

T.

Tanqueray-Willaume and Landau, In re	20 Ch. D. 465	568
Tapling *v.* Jones	11 H. L. C. 290	273
Taylor *v.* Shaw	Cart. Rep. 6	550
——— *v.* Timson	4 Times L. R. 208	511
Terrell *v.* Hutton	4 H. L. C. 1091	229
Terry and White's Contract, In re	32 Ch. D. 14	574
Throckmorton *v.* Crowley	Law Rep. 3 Eq. 196	520
Thrower's Case	1 Vent. 208; 3 Keble, 28	511, 512
Tildesley *v.* Harper	10 Ch D. 393	564
Tilleard, In re	3 D. J. & S. 519	228
Tilson *v.* Warwick Gas Light Company	4 B. & C. 962	228
Times Life Assurance and Guarantee Company, In re	Law Rep. 9 Eq. 382	147
Todd *v.* Studholme	3 K & J. 324	188
Tozier *v.* Hawkins	15 Q. B. D. 680	543
Transatlantic Company *v.* Pietroni	Joh. 604	153
Trevor *v.* Whitworth	12 App. Cas. 409	6
Turner and Skelton, In re	13 Ch. D. 130	105
——— *v.* Collins	Law Rep. 7 Ch. 329	206
Twycross *v.* Grant	4 C. P. D. 40	354
Tyler *v.* Yates	Law Rep. 6 Ch. 665	135

U.

Union Bank of London *v.* Ingram	16 Ch. D. 53	391
United Stock Exchange, In re	28 Ch. D. 183	148
Upton *v.* Brown	26 Ch. D. 588	6

V.

Vanderhaege, In re	20 Q. B. D. 146	118
Vezey *v.* Jamson	1 S. & S. 69	555

W.

Waite *v.* Littlewood	Law Rep. 8 Ch. 70	527
Wake *v.* Varah	2 Ch. D. 348	527
Walcott *v.* Lyons	29 Ch. D. 584	341
Walker *v.* London and North Western Railway Company	1 C. P. D. 518	259
——— *v.* Milne	11 Beav. 507	172
Walker's Estate, In re	12 Ch. D. 205	529

		PAGE
Walsh *v.* Lonsdale	21 Ch. D. 9	260
Walter *v.* James	Law Rep. 6 Ex. 124	303
——— *v.* Montague	1 Curt. 253	513
Warburton *v.* Haslingden Local Board	48 L J. (C.P.) 451	55
Ward, Re	31 Beav. 1	192
Waters, In re	W. N. 1889, p. 39	480
Webb *v.* Hewitt	3 K & J. 438	430
White's Case	12 Ch. D. 511	162
Whitehouse, Ex parte	32 Ch. D. 512	457
Wilkinson *v.* Clements	Law Rep. 8 Ch. 96	253
Willesford *v.* Watson	Law Rep. 14 Eq. 572; 8 Ch. 473	245
Williams *v.* Frith	1 Doug. 198	328
——— *v.* Griffith	6 M. & W. 32	328
Willoughby, In re	30 Ch D. 324	316
Wilson *v.* Allen	1 Jac. & W. 611	549
——— *v.* Church	13 Ch. D. 1	100
Winteringham *v.* Robertson	27 L. J. (Ex) 301	56
Wood's Trade Mark, In re	32 Ch. D. 247	43
Woodhouse *v.* Walker	5 Q. B. D. 404	532
Wotherspoon *v.* Currie	Law Rep. 5 H. L. 508	35
Wyatt *v.* Metropolitan Board of Works	11 C. B (N.S.) 744	220
Wycherley *v.* Wycherley	2 Eden. 175	206
Wylson *v.* Dunn	34 Ch. D. 569	300
Wynne *v.* Cookes	1 Bro. C. C. 515	550

Y.

Yeap Cheah Neo *v.* Ong Cheng Neo	Law Rep. 6 P. C. 381	555
Yellowly *v.* Gower	11 Ex. 274	532

BENGAL SECRETARIAT LIBRARY.

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

LEE *v.* NEUCHATEL ASPHALTE COMPANY.

C. A.
1887
STIRLING, J.
Dec. 7, 8, 13.
1888
Feb. 22.
C. A.
1889
Feb. 5, 6, 9.

[1886. L. 630.]

Company—Dividends—Payment of Dividend out of Capital—Wasting Property.

Where the shares of a limited company have, under a duly registered contract, been allotted as fully paid-up shares in consideration of assets handed over to the company, it is under no obligation to keep the value of its assets up to the nominal amount of its capital, and the payment of a dividend is not to be considered a return of capital, merely on the ground that no provision has been made for keeping the assets up to the nominal amount of capital.

There is nothing in the *Companies Acts* to prohibit a company formed to work a wasting property, as *e.g.*, a mine or a patent, from distributing, as dividend, the excess of the proceeds of working above the expenses of working, nor to impose on the company any obligation to set apart a sinking fund to meet the depreciation in the value of the wasting property. If the expenses of working exceed the receipts, the accounts must not be made out so as to shew an apparent profit, and so enable the company to pay a dividend out of capital, but the division of the profits without providing a sinking fund is not such a payment of dividends out of capital as is forbidden by law.

Decision of *Stirling*, J., affirmed.

THIS company was incorporated in July, 1873, as a limited company with a nominal capital of £1,150,000 divided into shares of £10, of which 35,000 were preference and 80,000 ordinary shares.

C. A.
1889
LEE
v.
NEUCHATEL
ASPHALTE
COMPANY.

One of the objects of the company as defined by the memorandum of association was to acquire as from the 1st of July, 1873, and on the terms expressed in an agreement dated the 17th of July, 1873, and made between the *Neuchatel Rock Paving Company* and five other companies of the first six parts, and *H. A. Bradbury* contracting on behalf of this company of the sixth part, or on such other terms as might be mutually agreed, the concession granted by the Government of *Neuchatel* and held by the *Neuchatel Rock Paving Company*, and the exclusive right thereunder of getting the bituminous rock and mineral products from the *Val de Travers*, and all the mines, works, business, property, and assets of the last-mentioned company, and also all the sub-concessions held by the other five companies, and all the business properties and assets of those companies. Another object mentioned in the memorandum was to work, dig, win, quarry, and get bituminous rock and other products under the above concession or any other concession to be acquired by the company, and the products of any mines acquired by the company, and to sell and dispose of the same on such terms as the directors might think fit, and to acquire, erect, and set up any new buildings or machinery for developing and carrying on the operations of the company, and to carry on the business of manufacturers of asphalte and bituminous rock pavement in every branch, and (subject to any exclusive concessions for the time being in force, whereby the area of the company's operations might be restricted) to lay down in all places wheresoever the pavement manufactured by or for the company.

By the agreement of the 17th of July, 1873, referred to above, the *Neuchatel Rock Paving Company* agreed to sell and transfer to the new company when formed, the above concession and all their mines, works, business, property, and assets; and the other five companies respectively agreed to sell and transfer to the new company their sub-concessions, business properties, and assets. The consideration was that there should be allotted to the *Neuchatel Rock Paving Company* 20,000 preference shares and the 80,000 ordinary shares in the intended company, and to the other five companies the number of preference shares therein mentioned, all such shares to be allotted as fully paid up. The

total number of preference shares thus to be allotted was 33,700 out of the 35,000.

The agreement was carried into effect, and on the formation of the company the shares were allotted in pursuance of it, and it will be seen that the company therefore was in substance an amalgamation of the six previous companies, no money passing.

The articles of association contained the following clauses:—

"97. The net profits of the company shall be applied and divided as follows. First, a dividend at the rate of £7 per cent. per annum shall be paid on the preferred shares in proportion to the amount for the time being paid up or deemed to have been paid up thereon. And subject to the payment of such dividend as aforesaid a like dividend shall be paid on the ordinary shares. And after payment of such dividend as aforesaid on all the shares the surplus of the net profits shall be divided by way of dividend rateably amongst all the shareholders in such proportion as aforesaid, but without preference or distinction.

"98. No such distribution of profits shall be made without the consent of a general meeting. It shall, however, be competent for the directors, without such sanction, in the interval between two meetings to declare an interim dividend on the preferred shares at any rate not exceeding 7 per cent., and on the ordinary shares not exceeding 4 per cent. per annum.

"99. In case of any dispute as to the amount of net profits the decision of the company in general meeting shall be final.

"100. The directors may, before recommending any dividend on any of the shares, set aside out of the net profits of the company such sum as they think proper as a reserved fund to meet contingencies or for equalizing dividends, or for repairing and maintaining the works connected with the business of the company, or any part thereof, and the directors may invest the sum so set apart as a reserved fund, or any part thereof, upon such securities as they may select; but they shall not be bound to form a fund, or otherwise reserve moneys, for the renewal or replacing of any lease, or of the company's interest in any property or concession.

"126. In case of a winding-up or distribution of the assets of the company, the holders of the ordinary shares shall be entitled

C. A.
1889
LEE
v.
NEUCHATEL
ASPHALTE
COMPANY.

in the accounts for 1885, nor in any previous account, has the company been properly debited with this depreciation, but nearly the whole of the moneys received for asphalte sold have been treated as available for distribution, so that the company is in effect returning to its shareholders in the shape of dividends a portion of the capital they have subscribed. No net profits were made in 1885, and before any dividend is paid the amount of the previous losses of the company ought to be made good. The moneys paid for the concession must be treated as paid for the purchase of all the asphalte comprised therein, if it can be gotten during the term, and, if it cannot all be gotten, then for the purchase of so much as can be gotten during the term. The amount which can be so gotten should be ascertained, and the prime cost of each ton of asphalte should figure on the debit side of the account as something to be deducted before any profit is arrived at. This has never been done: *Bloxam* v. *Metropolitan Railway Company* (1); *Mills* v. *Northern Railway of Buenos Ayres Company* (2). The case of *Knowles* v. *McAdam* (3) was overruled in *Coltness Iron Company* v. *Black* (4), upon the question of income tax; but if that question is eliminated, the judgments of *Kelly*, C.B., and *Cleasby*, B., in the former, and of Lord *Cairns* and Lord *Penzance* in the latter case, are all in our favour upon our contention as to the deductions which ought properly to be made from trade profits. It has been held in the case of tramways that, before net profits can be ascertained, a sum of money ought to be set aside as representing depreciation by wear and tear: *Dent* v. *London Tramways Company* (5); *Davison* v. *Gillies* (6), and the principle is applicable more strongly here, where the mine becomes less valuable every year. The loss should be made good out of the profits: *Upton* v. *Brown* (7). It is clearly *ultrà vires* in a company to pay away or return the capital to which its creditors have a right to look: *Guinness* v. *Land Corporation of Ireland* (8); *Trevor* v. *Whitworth* (9); *In re National Funds Assurance Company* (10); *In re Ebbw Vale*

(1) Law Rep. 3 Ch. 337.
(2) Ibid. 5 Ch. 621.
(3) 3 Ex. D. 23.
(4) 6 App. Cas. 315, 324.
(5) 16 Ch. D. 344.
(6) 16 Ch. D. 347, n.
(7) 26 Ch. D. 588.
(8) 22 Ch. D. 349.
(9) 12 App. Cas. 409.
(10) 10 Ch. D. 118.

Steel, Iron, and Coal Company (1); *In re Kirkstall Brewery Company* (2).

Robinson, Q.C., Sir *Horace Davey*, Q.C., and *W. P. Beale*, for the Company and four of the Directors:—

The gist of the argument for the Plaintiff is that there has been a loss of capital to the company. There not only has been no such loss, but the company is now richer in assets than when it was formed; and the Plaintiff has failed to shew that the company has not carried on its business in a prudent manner. The concession is now for a longer period, and it embraces a larger area. This is not the case of the purchase of property by a company for cash. The company purchased six undertakings for a nominal sum, which was paid entirely in shares; and took over the debts and assets of the selling companies. So that the subject of the purchase was partly corporeal and partly incorporeal, and the cost is the amount paid, less the value of the corporeal subject-matter, which is now greater than it was at the time of the purchase. The evidence is that there is more asphalte than can be got during the concession, and the Plaintiff has entirely failed to shew the loss or depreciation on which he relies. There is a distinction, which has been lost sight of in the argument for the other side, between fixed capital, or the amount sunk in the purchase of the undertaking, which cannot be paid away, and circulating capital, which stands upon a different footing. The question here is merely one of prudence or imprudence, and the Court cannot interfere with the decision of the shareholders upon the point. All that was decided in *Davison* v. *Gillies* (3) and *Dent* v. *London Tramways Company* (4) is that, before distributing profits as dividends, allowance must be made for maintaining the undertaking in a proper state of efficiency, and in this case the property of the company is in that state.

W. Pearson, Q.C., *Buckley*, Q.C., and *Methold*, for the other three Directors:—

A company is not bound to make a valuation year by year of

(1) 4 Ch. D. 827.
(2) 5 Ch. D. 535.
(3) 16 Ch. D. 347, n.
(4) Ibid. 344.

C. A.
1889
LEE
v.
NEUCHATEL
ASPHALTE
COMPANY.

its fixed capital before declaring a dividend; and it is illusory to say in a case like this that, whether the mine is inexhaustible or not, you must each year deduct a given sum for prime cost. Here, after all the extraction of asphalte, and the lapse of years, the concession is worth more now than it originally was.

[STIRLING, J., referred to *In re Ambrose Lake Tin and Copper Mining Company* (1).]

Upjohn, in reply.

1888. Feb. 22. STIRLING, J. (after stating the facts of the case, continued):—

It appears by the report of 1884 that the directors had resolved that the sum paid for the renewal of the concession should be written off at the rate of £1000 a year. The accounts for the year ending 1885 shew an excess of receipts over expenditure to the amount of £17,140 13*s.* 2*d.*, out of which, after setting aside £1000 in reduction of the amount paid in 1877 for the renewal of the concession, it was recommended by the directors, and resolved by a majority of the shareholders, that a dividend on the preferred shares at the rate of 9*s.* a share should be paid. This action has been brought to restrain the payment of that dividend.

Now the Court only interferes in an action constituted as the present is, where the acts proposed to be done by the directors are beyond the powers of the company. In order, therefore, to justify the interference of the Court in this action, the Plaintiff has to shew that it is beyond the powers of the company to pay the proposed dividend, and for this purpose he must establish that the dividend is intended to be paid, not out of profits, but out of the capital of the company. Accordingly, the allegations on which the Plaintiff's title to relief is founded are shortly these: that a large portion of the capital of the company has been lost, and that no profits were in fact made by the company in 1885, or, at all events, none sufficient for the payment of the proposed dividend.

The evidence adduced at the trial in support of these allega-

(1) 14 Ch. D. 390.

tions by the Plaintiff (and none was adduced by the Defendants) was directed to two points—first, to establish that the concession held by the company was a wasting asset which had during 1885 and the preceding years become depreciated both by effluxion of time and by the exhaustion of the subject-matter; and that neither in the year ending the 31st of December, 1885, nor in any preceding year, had adequate allowance been made for such depreciation; and, secondly, to shew that in addition there had occurred in the realization of the assets taken over by the company on its formation, a serious loss of £32,000 and upwards. Now, the capital of the company is nominally £1,150,000, but actually it has never existed in the form of cash, or otherwise than in the shape of the assets taken over at the formation of the company, or subsequently, from time to time, belonging to it. There is no evidence before me of the value either of the assets transferred to the Defendant company, or of the shares issued by it at the time of its formation; and in the absence of evidence it cannot be assumed that the value of the assets transferred to the Defendant company amounted to the par value of the shares, or that the value of the assets was £1,150,000, or any other sum.

In my opinion, the capital of the company at the time of its formation really consisted of the aggregate of the assets taken over from the various selling companies under the agreement of July, 1873. That agreement was merely a scheme for ascertaining and declaring the interests of those companies in that aggregate in accordance with the agreed value of their several contributions thereto, and unless it can be shewn that, after payment of the dividend, the assets now belonging to the Defendant company will fall short of those belonging to the company at the time of its formation, it cannot, in my judgment, be said that the dividend is being paid out of capital. Whether it would be necessary for the Plaintiff to establish more than this, I need not at present consider.

Has then the Plaintiff established such a deterioration in the value of the assets? I shall first deal with the value of the concession; and as regards the exhaustion of the subject-matter, I think not much weight can be attached to the Plaintiff's allega-

C. A.
1880
LEE
v.
NEUCHATEL
ASPHALTE
COMPANY.
Stirling, J.

tion. It is true that 230,000 tons have been extracted from the mine; but the amount remaining available for extraction is, according to the Plaintiff's own witnesses, no less than 1,340,000 tons. There is no probability that that amount can or will be got during the existence of the present concession. Then, as to effluxion of time, the question is, is the present concession at the present time of less value than was the concession taken over by the Defendant company on the 17th of July, 1873? The present concession is for a longer period, extends over a wider area, and is held on more favourable terms than the former.

What then do the Plaintiff's witnesses say as to its value? Two only have dealt with this—Mr. *Bauerman* and Mr. *Elder*.

[His Lordship then considered their evidence at some length. That of Mr. *Bauerman* was to the effect that the concession was of greater value now than the former one was in 1873. The evidence of Mr. *Elder* went to shew depreciation, but his Lordship considered his evidence to fall far short of what was necessary to establish the Plaintiff's case.]

Again, it was contended that if the company were to do in every year down to the expiration of the concession, as was proposed to be done in 1885, the concession would expire, and no fund would exist to represent its value; but it cannot, as I think, be assumed that the company will do in every year as was proposed to be done in 1885. They have not done so in the past. For 1884, as well as for some previous years, they paid no dividend. It may be that in some future year, the company will have to set apart a substantial sum to represent depreciation in the value of the concession; but so long as the capital remains intact, and the current receipts exceed the current expenditure, both according to the general law and under the provisions of these particular articles of association, it rests entirely with the shareholders to decide whether the excess shall be divided among them or set apart as a reserve fund for replacing wasting assets, and the Court has no power to interfere with their decision however foolish or imprudent it may seem to be.

The remaining point, as to the alleged loss on realization of certain assets, may be more shortly dealt with. It was based on a statement contained in one of the admitted documents.

No evidence was adduced by the Defendants, and the precise nature of this loss has not been made perfectly clear. It may possibly be nothing more than a matter of book entry. Assuming, however, that the loss actually occurred to the extent of £32,736 1*s.* 10*d.*, which is the statement referred to, nevertheless it appears that profits to a greater extent have been made and retained in the coffers of the company, and are, in the balance-sheet for the year ending the 31st of December, 1885, represented by investments to the amount of £36,000 and upwards, and the company are entitled, as I think, to set-off these investments as against the alleged loss.

I am therefore of opinion that the Plaintiff has failed to establish a case for the interference of the Court, and that the action must be dismissed. If there is no arrangement as to the costs, they must follow the event.

W. W. K.

C. A.

The Plaintiff appealed, and the appeal was argued on the 5th and 6th of February, 1889.

Rigby, Q.C., and *Upjohn*, for the Appellant:—

The preference shareholders are only entitled to dividends out of the net profits. There can be no profits unless the capital is kept up to the original amount. It appears by the books that there has been an actual loss of capital to the amount of £32,000 since the first concession, which ought to be replaced. But independently of this, the property is itself wasting. It consists of nothing but the concession, which only lasts till the year 1907, and the machinery. The capital therefore diminishes in value every year, and when the concession expires the shareholders will have nothing to represent their capital. The company ought therefore to set aside a sufficient sum to replace the capital at the end of the concession before they declare a dividend. It is said that the 100th article permits the directors to declare a dividend without providing such a fund; but if so, the article is *ultrà vires*, and void. It is in effect a permission to the company to reduce its capital, which cannot be done except in the method provided by the Act of Parliament: *In re Almada and Tirito*

C. A.
1889
LEE
v.
NEUCHATEL
ASPHALTE
COMPANY.

Company (1); *Trevor* v. *Whitworth* (2). The nominal amount of the share capital must be taken as the value of the capital when the company was formed, and the value ought to be kept up to that amount. There is no distinct authority relating to a company for working a wasting property, but *Coltness Iron Company* v. *Black* (3) is in our favour. There Lord *Blackburn* (4) adopts the definition of "profits" given by *McCulloch* in his book on Political Economy, who says: "Profits really consist of the produce or its value remaining to those who employ their capital in an industrial undertaking after all their necessary payments have been deducted, and after the capital wasted and used in the undertaking has been replaced." Although the declaration of dividends is generally a matter of internal management, yet the Court will interfere if a company is improperly employing capital in the place of income for that purpose: *Bloxam* v. *Metropolitan Railway Company* (5).

[LOPES, L.J.:—All the shareholders knew that it was a wasting property.]

They had no power to agree to let it waste. It is not like the case of an ordinary partnership. They must keep within the Acts of Parliament. This is an attempt to make a return of capital to the shareholders, which is beyond their power.

Sir *Horace Davey*, Q.C., and *W. P. Beale*, Q.C., for the company and the directors:—

We contend that this is a question of internal management, with which the Court cannot interfere. The Plaintiff has no case unless he can shew that the act intended to be done is *ultrà vires*. He contends—(1) that there has been an actual loss of capital, and that there cannot be profits until the loss has been made up; (2) that before the company can declare a dividend it must have capital assets not less in value than its nominal capital; (3) that where property belonging to a company is of a wasting character, the company is bound to set apart a sinking

(1) 38 Ch. D. 415.
(2) 12 App. Cas. 409.
(3) 6 App. Cas. 315.
(4) Ibid. 329.
(5) Law Rep. 3 Ch. 337.

fund to make up the depreciation, and that any provision in the articles dispensing with this obligation is *ultrà vires.*

As to the first point, we say on the evidence that there has not been a loss of capital. But suppose there had; it would be a bold proposition to say that a company cannot pay a dividend unless its assets are worth as much as they were at first. Can it be contended that before a railway company can pay a dividend it must revalue its undertaking? Suppose, owing to a fall in the price of iron, a railway is not worth nearly so much as it was at first, can it be urged that the company can declare no dividend until it has laid by enough to make up the difference? The Appellant forgets the distinction drawn by economists, which is a very substantial one, between fixed capital, the money expended in purchasing which is sunk once for all, and circulating capital, capital circulating like stock-in-trade, which in the ordinary course of business is parted with and replaced by other. Then on the evidence the assets of the company are worth a great deal more than they were when the company started, so there is no loss.

Then as to the second point, that the company must keep up its assets to a value equal to the nominal amount of its capital, there is no authority that shews a company to be under such an obligation. *Davison* v. *Gillies* (1) goes no further than to decide that the directors must keep the concern in a state of efficiency, so as to be capable of earning profits. *Dent* v. *London Tramways Company* (2) shews that Sir *G. Jessel* did not decide so much as he had been supposed to decide in the earlier case. Both cases go on the articles of the companies, and are quite consistent with each other, and neither of them supports the contention of the Appellant.

The third contention of the Appellant is that because the property is a wasting property, the company is bound to set apart a sinking fund. No doubt it may be considered prudent for a company, the principal part of whose assets is of a wasting character, to set apart such a fund; but whether it is under a legal obligation to do so is quite another matter. *Lambert* v. *Neuchatel Asphalte Company* (3), if it does not support a

(1) 16 Ch. D. 347, n. (2) 16 Ch. D. 344. (3) 30 W. R. 913.

C. A.
1889
LEE
v.
NEUCHATEL
ASPHALTE
COMPANY

plea of *res judicata*, which we submit it does, is at all events an authority in our favour.

[*Rigby*, Q.C.:—The question whether the article was *ultrà vires* was not raised there.]

We contend that the decision in *Lambert's Case* (1) concludes the matter; an appeal was abandoned. The declaration of a dividend is eminently a matter of internal management, and unless the Plaintiff can make out that there is an obligation on the company, paramount to anything in the articles, to set apart a sinking fund, the Court cannot interfere.

Robinson, Q.C., and *Methold*, for the preference shareholders:—

This concession is only a part of the company's business. It has power to take other concessions, and it has long ago replaced the purchase-money of this concession. An acceptance of the principles contended for by the Appellant would be ruinous to companies, for it would make it impossible for directors ever to recommend a dividend without going into elaborate calculations as to the value of their assets.

Rigby, in reply.

1889. Feb. 9. COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Stirling*, who dismissed the action. The action is brought by one ordinary shareholder, on behalf of himself and all other the ordinary shareholders against the company and the directors, one of whom has been appointed to represent the preference shareholders.

In order to understand the nature of the case, it is necessary to state shortly the nature of the formation of the company. There were six companies, which were in various ways entitled to the benefit of, and were working a concession for carrying on mines near *Neuchatel*, which produced the asphalte. The present company was formed by the amalgamation of these six companies. The nominal capital of the company is £1,150,000, divided into £10 shares. No money was paid when the present company was formed, but the assets of the previous companies

(1) 30 W. R. 913.

were taken over by the present company, and out of the 115,000 shares in that company 113,700, representing a nominal capital of £1,137,000, were given to the six old companies, and the concession and other rights which were made over were taken as being the assets to answer that share capital.

The object of the action is, on behalf of the ordinary shareholders, to prevent a dividend from being paid out of the excess of the receipts of the company above its expenditure for the year 1885. On what ground is that put? The articles justify the declaration of a dividend by a general meeting without making any reserve for the renewal or replacing of any lease or of the company's interest in any property or concession, but that is said to be *ultrà vires*. The Plaintiff puts his case in three ways. The first point I understand to be this, that a great part of the capital of the company has been lost. Now, what is meant by "capital"? If it is meant that any part of the assets has been lost, in my opinion that is wrong. I do not say that no part of the assets has ever been lost, but on the evidence before us the assets of this company are of greater value than at the time of the formation of the company in 1873. They then had, it is true, a concession, but for a shorter period than the one they have now got, and the royalty was very heavy. Now they have a longer time for the concession to run than they had in 1873, and they have got very much more profitable terms than they had at the first. In my opinion, so far from there being any loss of assets, the company has now in its possession a larger amount of assets than it had at the time it was first formed. Of course the present case is very different from that of a company where money has been paid on all the shares. That case is open to very different considerations. Here all that was taken by this company from the first companies was their assets, and in my opinion those assets have increased in value, so that as a matter of fact that first point entirely fails.

The Plaintiff's second point is that the property of the company is not now sufficient to make good the share capital; that assets to provide for that share capital must be made up before any dividend can be declared; and that if dividends are declared without that being done, that is to be treated as a return and a

C. A.
1889
LEE
v.
NEUCHATEL
ASPHALTE
COMPANY.
Cotton, L.J.

division of capital amongst the shareholders, and therefore illegal. In my opinion that is entirely wrong. It is a misapplication of the term "return of capital."

The word "capital" is used in many senses: one sense is the nominal capital, or, as I prefer calling it, the share capital, that capital which in the case of a company limited by shares is to be defined by the memorandum of association. Mr. *Rigby* relied on the provision (*Companies Act*, 1862, s. 12), that no alteration can be made in that capital but by adding to it except in the case of a reduction under the Act of 1867. It is impossible that the assets can be stated in the memorandum of association, but the share capital has to be stated. Then it is no doubt the law that the capital, in the sense of the assets of the company obtained for the shares, must not be applied except for the purposes of the company. That we shall have to consider both in this and in other parts of the present case. In my opinion there is no obligation in any way imposed upon the company or its shareholders to make up the assets of the company so as to meet the share capital, where the shares have been taken under a duly registered contract, which binds the company to give its shares for certain property without payment in cash. Shares must be paid up in cash, unless under an agreement duly registered there is a contract to allot or give the shares for something different. If there is an arrangement of that kind, which is obviously delusive, it may be that, although it has been duly registered, the shareholders who have taken the shares under it may, on proper proceedings being taken, be obliged to pay up in cash the difference between the value of their property and the nominal amount of their shares. But there is no suggestion that that ought to be done here, and in my opinion it would be wrong to say that a division among the shareholders of money which the company are not bound to apply in making up the nominal amount of their share capital is a return of capital. In my opinion this second point fails as well as the first.

The third point was to my mind the only one which occasioned any difficulty. It is said that the concession is a wasting property, and as it is a wasting property, that dividing its annual proceeds is dividing part of the capital assets of the company,

which are represented by this concession. That was pressed upon us, and that is a difficulty, because it is established, and well established, that you must not apply the assets of the company in returning to the shareholders what they have paid up on their shares, or in paying what they ought to have paid up on their shares. But we must consider exactly how the case stands. There is nothing in the Act which says that dividends are only to be paid out of profits. There is a provision to that effect in Table A, and that rather favours the view that the matter of how profits are to be divided and dealt with, and out of what fund dividends are to be declared, is a matter of internal regulation. But still there is this firmly fixed, that capital assets of the company are not to be applied for any purpose not within the objects of the company, and paying dividend is not the object of the company, the carrying on the business of the company is its object. If this property was property of another nature, property which would not be reasonably or properly consumed in providing profit, the case would stand in a very different position. If there was a permanent property which would not be reasonably or properly so consumed, but the fruit of which only would be used in providing profit, then if the directors were to sell, or the shareholders were to authorize a sale of that, and then to declare a dividend out of the proceeds, that would clearly come within the case of *Guinness* v. *Land Corporation of Ireland* (1), for it would be applying the capital of the company to a purpose which was not authorized. But here, for the purpose of getting the profit, there is necessarily a consumption year by year of part of the capital of the company.

Then what is to be the result? I think that in such a case as this, even without reference to the particular provision of art. 100, the question whether what has been done is really a division of capital by way of dividend must be considered in a reasonable and sensible way. If it is made to appear, as was said in *Stringer's Case* (2), "That for the purposes of fraud, or for any other improper motive, a company has declared and paid a wholly delusive and improper dividend, and has thereby in effect taken away from its creditors a portion of the capital which was available for

(1) 22 Ch. D. 349. (2) Law Rep. 4 Ch. 475, 488.

C. A.
1889
LEE
v.
NEUCHATEL ASPHALTE COMPANY.
Cotton, L.J.

the debts of those creditors, I entertain no doubt the Court would have full jurisdiction, and would exercise it by ordering the repayment of the money so improperly paid." If here it could be shewn that this dividend had been declared from improper motives, fraudulent motives, or with the intention not of dividing profit, but of dividing and returning capital, I think the Court ought to interfere; as it ought, in my opinion, to do in any case where there is any such improper dealing, either by directors or by the majority of the shareholders of the company. Bnt if the Court sees that the directors and the company have acted fairly and reasonably in ascertaining whether this is a division of profit and not of capital, and then in what is really a matter of internal arrangement (if it is done honestly, and does not violate any of the provisions of the articles) the Court is very unwilling to interfere, and in my opinion ought not to interfere, with the discretion exercised by the directors, who have the management of the company, or with the powers exercised by the company within the articles. Of course, if a power given by the articles goes beyond what can be given to the company or to the directors, then the Court must interfere; but in my opinion the only thing here to be considered is—is this really a division of the capital assets of the company under the guise of making and declaring a dividend? In my opinion, in this company, as in other companies, the directors and others who have the control, ought to consider whether in a fair, reasonable way what they are going to divide is to be considered as profits, but, in considering that, they may well have regard to the articles. There is no such necessity as was contended for by Mr. *Rigby*, to set apart every year a sum to answer the supposed annual diminution in the value of this property from the lapse of time. Reference was made to two decisions of the Master of the Rolls, which I think are to be explained so as in no way to conflict with the decision of Mr. Justice *Stirling* in this action, *Davison* v. *Gillies* (1) and *Dent* v. *London Tramways Company* (2). Those two decisions are entirely consistent with one another, and entirely depend on the directions contained in the articles of association, not on the general law. In *Davison* v. *Gillies* there was in the articles a direction that profits should be ascertained after making

(1) 16 Ch. D. 347, n. (2) 16 Ch. D. 344.

provision for the reparation of the tramway, and the Master of the Rolls said, when profits are to be divided by the directors it must mean the net profits, and that no dividend could be declared until provision had been made for the depreciation in the tramway and in the plant of the company. In *Dent* v. *London Tramways Company* (1), which was a case where preference shareholders were to have their dividend for each year paid to them out of the profits of that year only, what he held was: that they were entitled to be paid out of the profits of the year after setting aside sufficient for the maintenance of the tramway during that year only; and, therefore, he directed that provision should be made out of the profits of the year, not for the entire depreciation from the neglect to repair the tramway, but for the depreciation attributable to that year. That, in my opinion, entirely explains how those two decisions were come to, which Mr. *Rigby* contended were not consistent with one another. They favour the view which I entertain, that in considering whether this is to be treated as an honest division of profit, or as a division of capital under the guise of declaring a dividend, the Court will have regard to the directions of the articles, although, of course, if those articles authorize not a mere division of profit but a division of capital (using "capital" in the proper sense of the word—by which I mean permanent assets, and assets not to be expended in providing for the profit earned by the company), such a provision will be *ultrà vires* and void. Here there was not a division of capital under the form of a declaration of dividend by a scheme or plan for dividing assets of the company, the declaration of dividend was in accordance with the articles, and not contrary to the general law, and the Court ought not to interfere. In my opinion, therefore, the appeal fails.

LINDLEY, L.J.:—

I have come to the same conclusion. The actual point to be decided appears to me to be comparatively easy. The difficulty in the case arises from the invitation made to us by Mr. *Rigby* to lay down certain principles, the adoption of which would, in my judgment, paralyze the trade of the country.

(1) 16 Ch. D. 344.

C. A.
1889
LEE
v.
NEUCHATEL
ASPHALTE
COMPANY.
Lindley, L.J.

This company was formed in 1873, and, it may be stated shortly, was formed for the purpose of working a concession, which may be called a lease, of some asphalte mines or mineral property in *Switzerland*. The original lease was afterwards extended, and the company may be treated as having been formed for the purpose of acquiring a lease which will run out in 1907. It is obvious with respect to such property, as with respect to various other properties of a like kind, mines and quarries and so on, every ton of stuff which you get out of that which you have bought with your capital may, from one point of view, be considered as embodying and containing a small portion of your capital, and that if you sell it and divide the proceeds you divide some portion of that which you have spent your capital in acquiring. It may be represented that that is a return of capital. All I can say is, if that is a return of capital it appears to me not to be such a return of capital as is prohibited by law.

In order to make this out it is necessary to look through the *Companies Acts*. I have done so, and that not for the first time, and I cannot find any provision in the Acts which prohibits anything of the kind. The sections referring expressly to capital are very few. The two most important are the 8th and the 12th sections of the Act of 1862. The 8th section says that, when a company is registered as a company limited by shares, the memorandum of association must state the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount. Then the 12th section says that the capital so referred to in the memorandum may be increased or converted into stock, but the conditions contained in the memorandum shall not be otherwise altered. That prohibits what is called a reduction of capital. Then under sect. 26, certain returns are to be made, and in the returns so to be made must be specified among other things the amount of the capital and the number of shares into which it is divided, and the number of shares which have been issued and the number which have been forfeited, and the amount of calls made on each share and the total amount of calls received. In sects. 28 and 34 there is further provision that any alterations made in the capital pursuant to the Act are to be notified to the Registrar. Then in the

Act of 1867 provision is made for reducing the capital, and that was amended in 1877 by being applied to a reduction of capital when part of the capital was lost.

What I have stated is the whole of the enactments relating to capital which are to be found in the *Companies Acts*. If you look further you find next to nothing about profits or dividends. There is nothing at all in the Acts about how dividends are to be paid, nor how profits are to be reckoned; all that is left, and very judiciously and properly left, to the commercial world. It is not a subject for an Act of Parliament to say how accounts are to be kept; what is to be put into a capital account, what into an income account, is left to men of business. Mr. *Rigby*, with the courage which was necessary, asked us to say there was in these articles a provision as to division of profits which was contrary to law. If he can make that out he wins, but if he cannot make it out he loses. He saw that plainly enough. Now that raises a curious question, because, putting it into plain language, he is asking us, at the instance of the ordinary shareholders, to break faith with the preference shareholders. He invites us to do it because, he says, the bargain into which the two classes of shareholders have entered cannot be upheld in point of law. But he admits that if the bargain is to stand as entered into he is in the wrong. We must be careful before we say that a contract is illegal or invalid in point of law, and I now propose to address myself to that question.

This company having been formed for the purposes to which I have alluded, the articles contain clauses about distribution of profits. Art. 97 says: "The net profits of the company shall be applied and divided as follows: First, a dividend at the rate of 7 per cent. per annum shall be paid on the preferred shares in proportion to the amount for the time being paid up, or deemed to have been paid up thereon," and then it goes on as to payment of dividends on the ordinary shares. Art. 98 says: "No such distribution of profits shall be made without the consent of a general meeting." Art. 99: "In case of any dispute as to the amount of net profits the decision of the company in general meeting shall be final." Then sect. 100 contains a provision which carries the case against Mr. *Rigby* unless it is illegal. It

C. A.
1889
LEE
v.
NEUCHATEL
ASPHALTE
COMPANY.
Lindley, L.J.

says: "The directors may, before recommending any dividend on any of the shares, set aside out of the net profits of the company such sum as they think proper as a reserve fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining the works connected with the business of the company or any part thereof, and the directors may invest the sum so set apart as a reserve fund, or any part thereof, upon such securities as they may select; but they shall not be bound to form a fund or otherwise reserve moneys for the renewal or replacing of any lease, or of the company's interest in any property or concession."

First of all let us see what that means. We are dealing with a lease for a limited number of years, which is a wasting property, and while it is wasting the capital spent in acquiring it is wasting. The article says in so many words that although in every year the capital may be wasted by working out the mine so that at the end there may be nothing left, yet this company is formed on the principle that it shall not be obliged to replace year by year that which is so wasted. Mr. *Rigby* says that is contrary to law. Let us see whether that is made out.

Having stated shortly what are the provisions of the Acts of Parliament relating to this matter, I may safely say that the *Companies Acts* do not require the capital to be made up if lost. They contain no provision of the kind. There is not even any provision that if the capital is lost the company shall be wound up, and I think this omission is quite reasonable. The capital may be lost and yet the company may be a very thriving concern. As I pointed out in the course of the argument, and I repeat now, suppose a company is formed to start a daily newspaper; supposing it sinks £250,000 before the receipts from sales and advertisements equal the current expenses, and supposing it then goes on, is it to be said that the company must come to a stop, or that it cannot divide profits until it has replaced its £250,000, which has been sunk in building up a property which if put up for sale would perhaps not yield £10,000? That is a business matter left to business men. If they think their prospects of success are considerable, so long as they pay their creditors, there is no reason why they should not go on and

divide profits, so far as I can see, although every shilling of the capital may be lost. It may be a perfectly flourishing concern, and the contrary view I think is to be traced to this, that there is a sort of notion that the company is debtor to capital. In an accountant's point of view, it is quite right, in order to see how you stand, to put down company debtor to capital. But the company do not owe the capital. What it means is simply this: that if you want to find out how you stand, whether you have lost your money or not, you must bring your capital into account somehow or other. But supposing at the winding-up of the concern the capital is all gone, and the creditors are paid, and there is nothing to divide, who is the debtor? No one is debtor to any one. If there is any surplus to divide, then, and not before, is the company debtor to the shareholders for their aliquot portions of that surplus. But the notion that a company is debtor to capital, although it is a convenient notion, and does not deceive mercantile men, is apt to lead one astray. The company is not debtor to capital; the capital is not a debt of the company.

Having shewn from the Acts (negatively, of course, because this is a negative proposition, and can only be proved by looking through the Acts) that the Acts do not require the capital to be made up if lost, I cannot find anything in them which precludes payment of dividends so long as the assets are of less value than the original capital. If they are so, it becomes a question of prudence for mercantile men whether they will wind up or not. I have already pointed out that the Act says nothing to make the loss of the capital a ground for winding up, and I have already pointed out that it says nothing about profits. The Act does not say that dividends are not to be paid out of capital, but there are general principles of law according to which the capital of a company can only be applied for the purposes mentioned in the memorandum of association. That is a fundamental principle of law, and if any of those purposes are expressly or impliedly forbidden by the statutes, the capital cannot be applied for those purposes even though there may be a clause in the memorandum that it shall. That was pointed out by the House of Lords in *Trevor* v. *Whitworth* (1), and particularly in the elaborate judgment of Lord *Macnaghten*, in which he expressed

(1) 12 App. Cas. 409.

C. A.
1889
LEE
v.
NEUCHATEL ASPHALTE COMPANY.
Lindley, L.J

an opinion, although the point was not before him for decision, that if a company put into the memorandum of association a clause authorizing it to spend its capital in buying up its own shares, such a contract would be *ultrà vires*. That was only an expression of opinion by the learned Lord, but no one who has carefully studied the Acts of Parliament can entertain any doubt of the soundness of the opinion.

Now we come to consider how the *Companies Act* is to be applied to the case of a wasting property. If a company is formed to acquire and work a property of a wasting nature, for example, a mine, a quarry, or a patent, the capital expended in acquiring the property may be regarded as sunk and gone, and if the company retains assets sufficient to pay its debts, it appears to me that there is nothing whatever in the Act to prevent any excess of money obtained by working the property over the cost of working it, from being divided amongst the shareholders, and this in my opinion is true, although some portion of the property itself is sold, and in some sense the capital is thereby diminished. If it is said that such a course involves payment of dividend out of capital, the answer is that the Act nowhere forbids such a payment as is here supposed. The fact is, you cannot get out of the Act any prohibition against paying dividends out of capital except by having reference to the general principles to which I have alluded, and which general principles cannot be stretched, to my mind, to such a length as Mr. *Rigby* invites the Court to stretch them.

It appears to me that the proposition that it is *ultrà vires* to pay dividend out of capital is very apt to mislead, and must not be understood in such a way as to prohibit honest trading. If you treat it as an abstract proposition that no dividend can be properly paid out of moneys arising from the sale of property bought by capital, you find yourself landed in consequences which the common sense of mankind would shrink from accepting. On the other hand, if the working expenses exceed the current gains, you cannot divide your capital under the head of profits when there are no profits in any sense of the term, as was done, for example, in *Rance's Case* (1), *In re Oxford Benefit Building and Investment Society* (2), and *Leeds Estate, Building and Invest-*

(1) Law Rep. 6 Ch. 104. (2) 35 Ch. D. 502.

ment Company v. *Shepherd* (1). If those cases are studied, it would be seen, I think, with sufficient clearness that that is really what is meant. You must not have fictitious accounts. If your earnings are less than your current expenses, you must not cook your accounts so as to make it appear that you are earning a profit, and you must not lay your hands on your capital to pay dividend. But it is, I think, a misapprehension to say that dividing the surplus after payment of expenses of the produce of your wasting property is a return of capital in any such sense, as is forbidden by the Act. *Stringer's Case* (2) may be usefully referred to on this subject.

As regards the mode of keeping accounts, there is no law prescribing how they shall be kept. There is nothing in the Acts to shew what is to go to capital account or what is to go to revenue account. We know perfectly well that business men very often differ in opinion about such things. It does not matter to the creditor out of what fund he gets paid, whether he gets paid out of capital or out of profit net or gross. All he cares about is that there is money to pay him with, and it is a mere matter of book-keeping and internal arrangement out of what particular fund he shall be paid. Therefore you cannot say that the question of what ought to go into capital or revenue account is a matter that concerns the creditor. The Act does not say what expenses are to be charged to capital and what to revenue. Such matters are left to the shareholders. They may or may not have a sinking fund or a deterioration fund, and the articles of association may or may not contain regulations on those matters. If they do, the regulations must be observed; if they do not, the shareholders can do as they like, so long as they do not misapply their capital and cheat their creditors. In this case the articles say there need be no such fund, consequently the capital need not be replaced; nor, having regard to these articles, need any loss of capital by removal of bituminous earth appear in the profit and loss account.

It appears to me that our decision is perfectly consistent with the view taken by the Master of the Rolls in *Davison* v. *Gillies* (3)

(1) 36 Ch. D. 787. (2) Law Rep. 4 Ch. 475.
(3) 16 Ch. D. 347, n.

C. A.
1889
LEE
v.
NEUCHATEL
ASPHALTE
COMPANY.
Lindley, L.J.

and *Dent* v. *London Tramways Company* (1). They both turned on the articles which he had to deal with. I feel there is a little difficulty in reconciling the two, but they do not touch this case.

I hope I am not inadvertently, certainly I am not intentionally, laying down any rule which would lead people to do anything dishonest either to shareholders or creditors.

In my opinion the appeal fails entirely, and the judgment of the Court below must be affirmed with costs.

LOPES, L.J.:—

After the very full and exhaustive judgments that have been delivered I shall content myself with expressing my views very shortly; indeed I should think it unnecessary to do more than express my concurrence, except that the questions raised in this case are very important.

It is said by the Appellant that a company is not at liberty to pay a dividend unless they can shew that their available property at the time of declaring the dividend is equivalent to their nominal or share capital.

In my opinion such a contention is untenable. Where nominal or share capital is diminished in value, not by means of any improper dealing with it by the company, but by reason of causes over which the company has no control, or by reason of its inherent nature, that diminution need not, in my opinion, be made good out of revenue. In such a case a dividend may be paid out of current annual profits, out of profits arising from the excess of ordinary receipts over expenses properly chargeable to the revenue account, provided there is nothing in the articles of association prohibiting such an application, and provided it is done honestly. It appears to me that if a contrary view were adopted it might be successfully contended that where, owing to extraneous circumstances, the capital is increased in value, that increase might be dealt with as revenue or profits, and go to increase the dividend. This is contrary to all practice, and I think contrary to principle. The capital and the revenue accounts appear to me to be distinct and separate accounts, and,

(1) 16 Ch. D. 344.

for the purpose of determining profits, accretions to and diminutions of the capital are to be disregarded.

But it is said that where the capital is in its nature of a wasting character, depreciated by effluxion of time or exhaustion of materials, as in the case of mines or leaseholds, then a sum must be laid aside to meet the gradual depreciation, and that until such sum is laid aside there is nothing in the nature of profits divisible amongst the shareholders.

In the case now before the Court one of the articles provides that the directors may, before recommending any dividend, set aside and invest out of the profits such sums as they may think fit as a reserve fund; but the article goes on to say that they are not obliged to reserve moneys for the renewal or replacing of any lease, or of the company's interest in any property or concession.

Unless this article is *ultrà vires* no question arises, for the article expressly exonerates the directors from creating a reserve.

Is then this article *ultrà vires?* I think not. I know of no obligation imposed by law or statute to create a reserve fund out of revenue to recoup the wasting nature of capital. Subject to any provision to the contrary contained in the articles, I believe the disposition of the revenue is entirely in the hands and under the control of the company. Provided there is by the company no infraction of the capital, and nothing in the articles to the contrary, the disposition of the revenue is a matter of internal arrangement.

The capital in an undertaking like this is in its inherent nature wasting. The scheme of this undertaking is that there should be a gradual exhaustion of material; the wasting is the business of the company, and without such gradual exhaustion there would be no revenue. I am unable to see in this case that either capital or the produce of capital has been dealt with in a way which is not authorized.

With regard to the cases of *Davison* v. *Gillies* (1) and *Dent* v. *London Tramways Company* (2) it appears to me that the Master of the Rolls decided those cases with regard to the articles of association of the companies.

(1) 16 Ch. D. 347, n. (2) 16 Ch. D. 344.

C. A.
1889
LEE
v.
NEUCHATEL
ASPHALTE
COMPANY.

I think, therefore, that this appeal should be dismissed with costs.

Solicitors for the Plaintiffs: *Clarke, Woodcock & Ryland.*

Solicitors for the preference shareholders: *Makinson, Carpenter & Son.*

Solicitors for the company: *Bompas, Bischoff, Dodgson & Coxe.*

H. C. J.

C. A.
1889
Feb. 18.

EDISON & SWAN UNITED ELECTRIC LIGHT COMPANY *v.* HOLLAND.

[1886 E. 823.]

Patent—Action for Infringement—Third Parties—Application by Plaintiffs, after Judgment on Appeal, to amend by making Third Parties Defendants—Costs as against Third Parties—Rules of Supreme Court, 1883, *Order* XVI., *rr.* 48, 49, 52, 53, 54.

Defendants to an infringement action served a third-party notice for indemnity upon the *B. Company*, who were not parties to the action. The *B. Company* appeared as third parties in the action, and admitted their liability to the Defendants; and the Court ordered that they should have liberty to appear at the trial, and should be bound by the decision of the Court on any question as to the indemnity arising between them and the Defendants, but not otherwise. The *B. Company* were not made defendants, and filed no pleadings, but they appeared at the trial as third parties, and the Court gave judgment partly in favour of the Plaintiffs and partly in favour of the Defendants; but made no special order as to the third parties.

The Plaintiffs appealed, and after judgment had been given allowing their appeal, with costs against the Defendants, the Plaintiffs asked for an injunction and costs against the third parties (who had appeared on the appeal), and, if necessary, for an order to amend so as to make them defendants:—

Held, by *Cotton*, L.J., that the Court had no jurisdiction to give a judgment against these third parties as if they were defendants, and that it would be wrong after judgment on appeal to grant liberty to amend so as to enable the Court to give relief against the third parties which was not asked for at the trial.

Held, by *Lindley*, L.J., that the Court had jurisdiction to grant the liberty to amend applied for, but that it should not be exercised in the present case, and

Held, by the Court (*Cotton* and *Lindley*, L.JJ.), that under Order XVI.,

rule 54, the Court had jurisdiction to order the third parties to pay the costs both of the appeal and below, and that as the third parties had in reality fought the Plaintiffs and failed, an order for the payment of such costs must be made against them as well as against the Defendants.

APPEAL from Mr. Justice *Kay*.

This was an action to restrain the infringement of two patents, one of which was granted to *Cheeseborough* and the other to *Edison*. It was originally brought against *Holland* who had used, and the *Jablochkoff Company* who had sold, certain electric lamps: but those Defendants claimed indemnity over against the *Anglo-American Brush Company*, who were the makers of the lamps, and issued and served upon them a third-party notice for indemnity under Order XVI., rule 48. The *Brush Company* appeared and admitted their liability to the Defendants. The Defendants then applied for directions under Order XVI., rule 52, and the Court, on the 18th of November, 1886, made an order that the *Brush Company* should be "at liberty to appear at the trial of the action, and take such part therein as the Court should direct," and should be bound by the decision of the Court in this action on any question as to the above indemnity which may arise between the said "*Brush Company* and the Defendants, but not further or otherwise."

At the trial, the *Brush Company* appeared as third parties, but delivered no pleading, and Mr. Justice *Kay*, as regards *Cheeseborough's* patent, decided in favour of the Plaintiffs, and gave them relief by way of injunction against the Defendants; and as regards *Edison's* patent, decided against the Plaintiffs on several grounds, amongst others, that *Edison's* claim was too wide, and that he had not in his specification sufficiently described his invention; and his Lordship directed taxation of the Plaintiffs and Defendants' costs to the extent to which each of them had succeeded, and a set-off of one against the other, but made no special order as to the third parties. From that decision the Plaintiffs appealed, serving the third parties as well as the Defendants, and the Court (*Cotton*, *Lindley*, and *Bowen*, L.JJ.) allowed the appeal with costs as against the Defendants.

After judgment had been given by their Lordships,

C. A
1889
EDISON & SWAN UNITED ELECTRIC LIGHT COMPANY v. HOLLAND.

Sir *Richard Webster*, A.G. (with whom were *Aston*, Q.C., *Moulton*, Q.C., and *Bremner*), for the Appellants:—

The *Brush Company*, who were the makers of the lamps, and who had agreed to indemnify the Defendants, have appeared as third parties, and have in reality fought this action against the Plaintiffs, contesting the validity of their patents.

The issue has been tried directly between the Plaintiffs and the *Brush Company*, who are now estopped from denying the validity of the Plaintiffs' patents. Under these circumstances the Plaintiffs are entitled to an injunction against them as well as against the Defendants.

[COTTON, L.J.:—Are you not introducing a new practice not justified by the order or the statute? If the Plaintiffs had amended and made the third parties defendants, the position would have been different.]

The point is a new one, but we submit that, having regard to rules 48 to 53 of Order XVI., particularly to rule 49, by which, in default of appearance, the third party must admit the validity of a judgment against the defendant, and to rule 53, which gives the Court power to make orders as to the mode and extent in or to which the third party shall be bound or made liable by the judgment in the action, it was the intention in cases like this, where a real defendant has come in in place of a nominal defendant and has failed, to give the Court power, the matter having been tried *inter partes*, to make an order against the third party as though he were the original defendant.

[COTTON, L.J.:—Order XVI., rule 53, appears to refer to an interlocutory order made on the hearing of an application for directions under rule 52. We cannot now make such an order.]

We submit that your Lordships have the jurisdiction, and we also ask for an order under the general powers of the Court, and also under Order XVI., rule 54, against the third parties for the payment of costs both here and below. An order making the third parties defendants would have been granted at once at the hearing by the Court of first instance, and the Court of Appeal, being in the place of the Court of first instance, has full power

over all the proceedings, can entertain any application which might have been reasonably made to the Court of first instance, and can put the parties in the position in which justice can be best done between them, correcting, if necessary, and if it can be done without injustice, any error or mistake in the conduct of the case, thereby simplifying proceedings and saving unnecessary trouble and expense: *Cropper* v. *Smith* (1). "A third party, when joined as such, becomes a party to the cause with all the liabilities of a party, and one of those liabilities is the liability to pay costs": *Hornby* v. *Cardwell* (2); *Piller* v. *Roberts* (3). A plaintiff is entitled to discovery from a third party who has appeared to litigate with him; and has the right to examine him by interrogatories. *MacAllister* v. *Bishop of Rochester* (4); *Eden* v. *Weardale Iron and Coal Company* (5). The third parties accordingly are substantially in the position of defendants; but if necessary we ask your Lordships to give us liberty to amend so as to make them defendants.

Sir *Horace Davey*, Q.C., *Finlay*, Q.C., and *J. C. Graham*, for the Defendants and the third parties:—

The Plaintiffs, no doubt for good reasons, deliberately chose to sue *Holland*, who used the lamps, instead of the *Brush Company*, who, it is alleged, made and furnished them, and it would be contrary to all principle and precedent to allow the Plaintiffs, after judgment has been given in their favour on appeal, to amend by making the *Brush Company* defendants for the purpose of obtaining relief against them for which they did not sue in the first instance, and which they did not ask in the Court below. It is impossible to say what defence the *Brush Company* might have had.

[COTTON, L.J.:—We do not require to hear you further on the question of amendment.]

As to an order for costs against the *Brush Company*, we submit that such order would not be right as a matter of form in a case like the present. Such an order should only be made

(1) 26 Ch. D. 700, 710.
(2) 8 Q. B. D. 329, 338.
(3) 21 Ch. D. 198.
(4) 5 C. P. D. 194, 207.
(5) 34 Ch. D. 223; S. C. 35 Ch. D. 287, 292, 296.

C. A.
1889
EDISON & SWAN UNITED ELECTRIC LIGHT COMPANY v. HOLLAND.

when the third party has put in a defence; but here we have done nothing but appear on the trial and on the appeal. We do not, however, care to contest it, for the solicitors of the Defendants and the third parties are the same, and the matter is of no importance. The third parties merely appeared for the purpose of seeing that the defence, the result of which affected their indemnity, was properly conducted by the Defendants, and they appeared by the same counsel as the Defendants. Here the notice of appeal was addressed to the Defendants and the third parties, and we appear for the Respondents generally.

Sir *Richard Webster*, A.G., in reply:—

In *Hornby* v. *Cardwell* (1) the third party was simply allowed to attend the trial, and yet an order for costs was made against him. Here the solicitor for the *Brush Company* has, since the change of solicitors, conducted the whole litigation, and they have been the real defendants. Moreover, Order XVI., rule 54, is clear.

COTTON, L.J.:—

A curious point has been raised after judgment in this case. The Plaintiffs now ask the Court to treat the third parties in this action as if they were defendants to the action, not only to the extent of making them pay costs, but also to the extent of granting relief against them by way of injunction.

That, however, would, I think, be wrong, because the third parties are not in reality defendants.

If a plaintiff has a direct claim against a third party his proper course, as soon as that is known, is to amend the statement of claim, and make the third party a defendant, and then the Court has all that jurisdiction as against that defendant, which is gained by serving him with a writ and bringing him in as a party to the action. Why that was not done in the present case I cannot understand, except, perhaps, that the Plaintiffs did not like to bring in another person as against whom they would be liable to costs, as occurred before Mr. Justice *Kay* in reference to the *Edison* patent.

It is, of course, not desirable that there should be unnecessary

(1) 8 Q. B. D. 329.

litigation. But I do not see that for that reason the Court could assume a power which, in my opinion, it has not got. It is very true that when these third parties came in and desired to defend the action, and the direction was given, they might have had that liberty given on their undertaking to submit to any judgment which the Court might think fit to give as against them, supporting, as they did, the interest of the Defendants, and really being the persons who ought to have been made defendants. But that was not done. The order which was made was simply an order that the *Brush Company* "shall be at liberty to appear at the trial of the action, and take such part therein as the Court shall direct, and the said *Anglo-American Brush Electric Light Corporation, Limited,* shall be bound by the decision of the Court in this action in any question as to the above indemnity which may arise between that company and the Defendants." If the Plaintiffs were not satisfied with that they ought to have said, "No, that will not do for us, other terms ought to be imposed upon this third party;" but the proper course, looking to the origin of the jurisdiction, and the process by which a person is brought within it, was for the Plaintiffs to amend their pleadings so as to bring before the Court the real persons who were making these lamps, and thus, as they contend, infringing their patent. That course was not taken for some reason. I do not know why. In my opinion we have no jurisdiction to make a decree against these third parties as if they were defendants, and to grant an injunction and damages against them in this action as if they were made parties. That they will be unwise enough to dispute the Plaintiffs' rights as regards this patent when another action is brought against them I cannot suppose. It is contended on behalf of the Plaintiffs that they ought to have leave to amend, and that the Court of Appeal ought to make such order as the Court of first instance ought to have made below, and to allow such amendments as may be necessary for that purpose. But what was the course taken by the Plaintiffs on the trial in the Court below? In the Court below they never asked for this relief as against these third parties. It is very true there was an expression by Sir *Horace Davey,* which was relied upon, that the third parties sought to be put in direct relation with the Plaintiffs.

C. A.
1889
EDISON & SWAN UNITED ELECTRIC LIGHT COMPANY v. HOLLAND.
Cotton, L.J.

I do not quite understand myself what that meant; but these parties did not act on that and treat it as a statement that the third parties should be made defendants. It may have been immaterial then, because the costs given to the Defendants were the costs of the Defendants as regards that part of the action in which the Plaintiffs failed, and costs were given as against the Defendants as regards that part of the action on which the Plaintiffs succeeded. In my opinion it would be wrong, under those circumstances, and in the course which has been adopted by the Plaintiffs now, to grant liberty to amend in order to enable the Court to give different relief against the third parties from that which was asked for at the trial of the action.

Now as to the costs. As regards the costs of the appeal, as the third parties do appear on the appeal, and as they were served with notice of appeal, there will be no difficulty in making an order against them for payment of the costs of the appeal, and, in my opinion, the Court has jurisdiction, having regard to rule 54, to make them pay the costs. Therefore, as regards this part of the action, I think it would be wrong to alter the judgment. As regards the other part of the action we may, when we alter the judgment of Mr. Justice *Kay*, make an order against the third parties, as well as against the Defendants, for payment of the costs of the action.

LINDLEY, L.J.:—

In substance the third parties here are the people who fought the Plaintiffs, and if I had tried the case and had come, on the merits, to the conclusion at which I have now arrived, and had been asked to amend by making the third parties defendants, I should have done so without the slightest hesitation; and I am not at all sure that if I were sitting alone on the appeal I should not do so now. I think there is power to do it. But whether there is or is not I do not think justice requires us to exercise the power. I will not differ from my learned Brother on that point.

As to costs, there is no difficulty at all. Rule 54 of Order XVI. clearly gives us power to make what order we think right as to costs. Now, what order is right? Those who really fought the

Plaintiffs and failed should pay the costs. The order will be that the third parties do pay the costs here and below.

C. A.
1889.
EDISON & SWAN UNITED ELECTRIC LIGHT COMPANY v. HOLLAND.

Solicitors: *Ashurst, Morris, Crisp, & Co.*; *Renshaws.*

W. W. K.

THOMPSON *v.* MONTGOMERY. *In re* JOULE'S TRADE-MARKS.

[1888 T. 1718.]

C. A.
1888
Nov. 9.
C. A.
1889
Feb. 20, 21

Trade-mark—Injunction—Rectification of Register—"Stone Ale"—Patents, Designs and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 74, *sub-s.* 2.

The Plaintiffs and their predecessors had for a hundred years carried on a brewery at *Stone*, and their ale had become known as "*Stone Ale.*" They had registered several trade-marks which contained the words "*Stone Ale*" in combination with some device or the name of their firm; and in 1888 they registered as an additional trade-mark the words "*Stone Ale*" alone.

The Defendant built a brewery at *Stone* over which he placed the words "*Stone Brewery,*" and when that was objected to by the Plaintiffs, he altered it to "*M.'s Stone Brewery,*" with a device containing the words "*Stone Ale*" and a monogram somewhat resembling the Plaintiffs' trade-mark. The Plaintiffs brought an action for an injunction, and the Defendant moved under sect. 74 of the *Patents, Designs and Trade Marks Act,* 1883, to enter a disclaimer on the part of the Plaintiffs of the exclusive use of the word "*Stone*" and otherwise to rectify the register:—

Held (1.) That the word "*Stone*" was not a word common to the trade, and consequently the case did not come within sect. 74, and the application for a disclaimer must be refused.

(2.) That there being no evidence that the Plaintiffs had used the expression "*Stone Ale*" by itself as a trade-mark before the 13th of August, 1875, the Plaintiffs could not register it as a trade-mark under sect. 64, sub-s. 3 of the same Act.

(3.) That the Plaintiffs had acquired by user a right to the use of the words "*Stone Ale*" within the principle of *Wotherspoon* v. *Currie* (1), and that the conduct of the Defendant being in the opinion of the Court calculated to deceive the public into supposing that his ales were brewed by the Plaintiffs, the Plaintiffs were entitled to an injunction.

MESSRS. *JOULE & SONS*, the Plaintiffs, and their predecessors in business, had been brewers at *Stone*, in *Staffordshire*, for

(1) Law Rep. 5 H. L. 508.

C. A
1889
THOMPSON
v.
MONTGOMERY.
In re
JOULE'S
TRADE-
MARKS.

more than one hundred years, and had been for many years, with an unimportant exception, the only brewers in the town, which contained between 6000 and 7000 inhabitants. They called the ale brewed by them "*Stone Ale*," and it had become known by that name in the town and its neighbourhood. In the year 1881 and in a subsequent year they had registered five trade-marks in which the words "*Stone Ale*" occurred in company with the name "*Joule*" or "*Joule & Sons*" and other devices, their most common trade-mark being "*Joule's Stone Ale*" on a yellow ground with a red cross. The Plaintiffs' brewery was known as "*Stone Brewery*," and for nearly thirty years that name had been painted on their drays and wagons.

In July, 1888, they registered the words "*Stone Ale*" (No. 74,764) as an old trade-mark, used by them before the 13th of August, 1875.

The Defendant, *Thomas Montgomery*, was a licensed victualler at *Liverpool*, and sold the Plaintiffs' ale in his business as *Stone Ale*. In April, 1888, the Defendant commenced to build a brewery in the town of *Stone*, being induced to do so, as he said, by the superior quality of the water there, and the convenience of the place with respect to railway accommodation. He caused a board to be placed over the unfinished building, containing a notice that the brewery was to be called "*Stone Brewery*."

The Plaintiffs remonstrated with the Defendant for calling his brewery by that name, and the Defendant then removed the board and replaced it by another bearing the name "*Montgomery's Stone Brewery*," with a device consisting of a circle or garter with the words "*Stone Ale*" and a monogram of the letters "*T. M.*" on a yellow ground, the letter *T.* being coloured red. To this were added the words "Trade-mark." The Plaintiffs complained that the general effect of this device was very similar to that of their own trade-mark. The Defendant also put up a similar device at one of his houses of business at *Liverpool*.

On the 10th of October, 1888, the Plaintiffs brought the present action against the Defendant claiming an injunction to restrain him from selling or advertising under the name "*Stone Ales*" or "*Stone Ale*" any ale or beer not made by the Plaintiffs,

and from carrying on the business of a brewer under the title of "*Stone Brewery*" or "*Montgomery's Stone Brewery*," or any other title calculated to induce the belief that the business carried on therein was the Plaintiffs' business, and from infringing the Plaintiffs' trade-mark.

The Defendant in his defence alleged that the Plaintiffs always sold their ale not as "*Stone Ale*" simply, but as "*Joule & Sons' Stone Ale*," and he claimed the right to use the words "*Stone Ales*" or "*Stone Ale*" provided he did not use them in such a way as to lead the public to suppose that the ale was made by the Plaintiffs.

The Plaintiffs moved for an interim injunction in the terms of their claim; and the Defendant made a counter motion under the *Patents, Designs and Trade Marks Act*, 1883, that the register of trade-marks might be rectified by adding to the registration of the Plaintiffs' trade-marks a note disclaiming any exclusive right in the Plaintiffs to the use of the word "*Stone*," or, in the alternative, by removing the word therefrom, or for such other rectification of the register as might seem just.

The motions were heard before Mr Justice *Chitty* on the 9th of November, 1888.

Romer, Q.C., and *Waggett*, in support of the Plaintiffs' motion:—

We rely upon the decisions in *Wotherspoon* v. *Currie* (1) and *Siegert* v. *Findlater* (2).

Byrne, Q.C., and *Somers Browne*, for the Defendant:—

Wotherspoon v. *Currie* was decided on the ground of fraud, and the Defendant was restrained from using the word "*Glenfield*" on that ground, *Glenfield* being only a small hamlet containing about sixty inhabitants, and having no special advantages for the manufacture of starch. *Stone* however is a town of 6000 inhabitants, and the water is particularly suitable for brewing purposes. The Plaintiffs admit that they cannot go so far as to ask that we may be restrained from using the word "*Stone*" altogether, that being so *Wotherspoon* v. *Currie* is not applicable. We submit that any trader is entitled to describe his goods by

(1) Law Rep. 5 H. L. 508. (2) 7 Ch. D. 801.

C. A.
1889
THOMPSON v. MONTGOMERY.
In re JOULE'S TRADE-MARKS.

the name of the place where they are manufactured, and that no one trader can claim a monopoly in the use of the name of that place. The Plaintiffs are only entitled to such an order as was made in *Braham* v. *Beachim* (1), with which we should be satisfied.

CHITTY, J.:—

This is a motion that I have to decide, as I need hardly say, upon the materials before me on the motion. Mr. *Byrne* has offered an undertaking with regard to the matters which are covered by the notice of motion, and Mr. *Romer* has asked now for the undertaking or an order in similar terms, except as to one point, and the point where counsel are not agreed is as to the form of the injunction. The Plaintiffs say they ought to have an injunction granted which will prevent the Defendant from using the words "*Stone Ale*," without any qualification —that is an absolute injunction—until judgment or further order. The Defendant does not object to the Plaintiffs taking an injunction in that form, provided the qualification is added, "so as to induce the belief that the ale sold by the Defendant is the ale of the Plaintiffs." The question is whether those words I have mentioned ought to be inserted or not.

The Plaintiffs' case on the present materials appears to me to be proved in a satisfactory manner. The Plaintiffs and their predecessors in title have had a brewery, and have carried on the business of a brewery at *Stone* in *Staffordshire* for about one hundred years. With an exception that need not be mentioned, their brewery has been the only brewery at *Stone*. *Stone* is a town the number of the inhabitants of which is somewhere between 6000 and 7000 at the present day, and the Plaintiffs say, and they have established on the present occasion to my satisfaction, that they have sold their ale as "*Stone Ale;*" that the term "*Stone Ale*" has become well known in the market, and is now accepted in the market in a secondary sense; and that it no longer denotes, as unquestionably originally it did, ale brewed at *Stone*, but it denotes ale of the Plaintiffs' brewing so that the meaning of that term is the Plaintiffs' ale. Consequently

(1) 7 Ch. D. 848.

they say that they have an exclusive right to the term "*Stone Ale*," it being a part of their case as shewn by the evidence that nobody else has ever used the term. They say that if the Defendant sells his ale as "*Stone Ale*," he will necessarily lead people to believe that the Defendant's ale is the Plaintiffs' ale, and take away the benefit of the reputation which in the process of a hundred years or so has been acquired by the mode in which the Plaintiffs and their predecessors in title have conducted their brewing business.

It is unnecessary to go into the other part of the case, because of Mr. *Byrne's* submission, but the facts have been opened before me and I need do no more than state my opinion very shortly as to the result. It is this, that as the matter stands, I am satisfied that the intention of Mr. *Montgomery*, the Defendant, was by tricks and devices to obtain the benefit of the reputation which the Plaintiffs had acquired. The name "*Stone*" is not a name which a person who knows nothing about the matter would connect with ale, and the Defendant for a considerable time took the Plaintiffs' ale, the Defendant himself being an innkeeper or hotel keeper in *Liverpool*, and having several establishments of that class there. He proposed and still proposes to do what he is entitled to do, namely, to set up a brewery at *Stone*. There is some explanation given on the affidavits as to why he chose the name "*Stone*." At the present moment I am not satisfied with any of the explanations he has given, and I say that, because of the general nature of the case, which has proved to my satisfaction that the intention was to get the Plaintiffs' business.

I need not go through the various steps which Mr. *Montgomery* took, and the various retreats which he has made from time to time upon being pressed by the Plaintiffs. I need not do more than refer to what was said by his counsel that, when Mr. *Montgomery's* attention was called to this or that, Mr. *Montgomery* would make a concession. I do not adopt as a ruling principle in this Court, or in any other Court, that a man who first contemplates what appears to be a fraud upon a fellow-trader is entitled to say, "Directly you called my attention to it I succumbed." The truth is that a man ought to see at once what he is about: he ought not to require to have his attention called to

C. A.
1889
THOMPSON v. MONTGOMERY.
In re JOULE'S TRADE-MARKS.
Chitty, J.

it at all. I make such observation for the purpose of saying that I am not satisfied with Mr. *Montgomery's* explanation of the reasons why he chose "*Stone.*"

Now he is clearly entitled to set up his brewery at *Stone*, and he is clearly entitled to brew beer and ale at *Stone*, and to sell them in such a manner as is not calculated to deceive. He may mention on any ale that he makes that the ale is brewed at *Stone*; but that is not the question. Can he honestly use the term "*Stone Ale*," having regard to what the Plaintiffs have shewn to be the present market meaning of that term? Mr. *Byrne* and Mr. *Browne* addressed a very ingenious argument to me, but they were not able to shew, nor did they in any way shew, how the term as a whole could be used fairly without inducing the belief that I have mentioned. But if the Plaintiffs have established, and I think they have, that the term has the meaning which they attribute to it, and that that is the meaning in the market, I am unable myself to see how the term could be used by another brewer without invading the Plaintiffs' rights.

The Plaintiffs do not ask for an injunction to restrain the Defendant from using the term "*Stone.*" The Defendant will be at liberty to use the term "*Stone*," and he will be at liberty to use the term "*Stone*" in reference to the ale that he brews, but as at present advised, as the evidence stands, I think the injunction ought to go without qualification as to "*Stone Ale.*"

The great authority to which the Plaintiffs have referred upon this matter is *Wotherspoon* v. *Currie* (1), the *Glenfield Starch Case*, and in that case it appears from the notes of the injunction that was granted by the House of Lords, that the Defendant was restrained from selling starch as "*Glenfield Starch*," and the suggestion on the part of the Defendant is that a man might subsequently have set up, or the Defendant *Currie* might have subsequently set up, a starch business at *Glenfield*, and the injunction would have restrained him from using the term "*Glenfield.*" The argument really comes to this, that the House of Lords were in error in granting the unqualified injunction, because they granted an injunction as to "*Glenfield Starch*" without any limitation, and if I may say so, with great respect

(1) Law Rep. 5 H. L. 508.

to the House of Lords, rightly. I see no reason to suppose that if any qualification had been suggested to them such as has been suggested to me, namely, that Mr. *Currie* might afterwards really have a place of business there, he would have been entitled to use the term. Why do I say that? Because the House of Lords said that the term "*Glenfield Starch*" had become the property of Mr. *Wotherspoon*, and nobody there could make use of that property to his detriment without his consent.

The case did not turn, as was suggested, on the size of the place, though that was an element, no doubt, in the discussion as to the *bona fides* of Mr. *Currie*. But the House of Lords did not base their proposition on the size of *Glenfield*. It was one of the circumstances which led them to hold that Mr. *Currie* was perpetrating a fraud on Mr. *Wotherspoon*.

I think, therefore, that as the matter stands, the injunction must go without qualification.

I need not refer to *Burton-on-Trent*, and *Wrexham*, because in those cases the matter stands on an entirely different footing. The water at *Burton-on-Trent* is no doubt water which is of high value in reference to the brewing of beer, and the same thing may be said as to *Wrexham*. There are many brewers both at *Wrexham* and *Burton*, and nobody will acquire, as far as I know, a title to use "*Burton Ale*" or "*Wrexham Ale*" so as to denote exclusively beer of his brewing. In the market the terms do not denote the brewing of any particular man. The terms are only general terms designating the place at which the ale is brewed.

I therefore grant an injunction in the form which Mr. *Romer* asks.

It is right to explain that the Defendant can use the description "*Montgomery's Brewery, Stone.*" There never could be any objection to that.

I wish to add one word particularly about your motion, Mr. *Byrne*.

The Plaintiffs have registered their trade-mark with the term "*Stone Ale*," it being an old mark, and I think they were justified in registering it. But it is said that there ought to be some qualification by way of disclaimer added, and strange to say the

C. A.
1889
THOMPSON v. MONTGOMERY.
In re JOULE'S TRADE-MARKS.
Chitty, J.

Defendant who is the moving party asks that there may be some disclaimer with reference to the term "*Stone*," but he asks no disclaimer with reference to the word "*Ale*." He says there ought to be some disclaimer which should shew that other persons are entitled to use the term "*Stone*" in reference to ale. In this case the term is registered as a whole, and no doubt "*Stone*" is a distinctive part of it, "*Ale*" being a common and general term. But what he has registered is the term as a whole which has come in the market to designate his goods. I do not see any reason why he should disclaim "*Stone*," because I am satisfied that if he uses it as his trade-mark, as no doubt he is doing to-day, he can get no injunction to restrain a man who is brewing beer at *Stone* from saying that his beer is brewed there. The gist of the trade-mark is the combination of the terms, and the right to it is founded upon what has been proved to my satisfaction—that the term is now used in a secondary sense indicating solely ales of the Plaintiffs' brewing.

Therefore I refuse that motion with costs.

G. M.

From this decision the Defendant appealed. The appeal came on to be heard on the 20th of February, 1889.

Sir *H. Davey*, Q.C., *Byrne*, Q.C., and *Somers Browne*, for the Appellant:—

We say "*Stone Ale*" is not "distinctive" but descriptive, and we ask for an order under sect. 74 of the *Patents, Designs and Trade Marks Act*, 1883, for an entry disclaiming the right to the exclusive use of those words. The application of the Respondents was made on the 7th of April, 1888, to register "*Stone Ale*" as a trade-mark, on the ground of long prior user. The evidence, according to our view of it, is very slender as to the use of the words "*Stone Ale*" as a trade-mark; they were used as part of a trade-mark in conjunction with the name "*Joule*," or with a red cross. But we go further and say that in no case could the words "*Stone Ale*," which are purely descriptive, be a good trade-mark within the definition given in sect. 64 of the Act. Under sub-s. 3, in order to enable the words to be registered on the ground of

user before the 13th of August, 1875, they must be "special and distinctive." That must denote something which specifies the maker, and the evidence does not refer to any label or mark containing these words alone. The order as to rectification is a final order, but the Plaintiffs have become alive to the deficiency in their evidence, and though the appeal is a final one they have produced fresh evidence, but it only comes to this, that labels containing the words "*Stone Ale*" alone, were printed, there being no evidence that they were ever used. If words are merely descriptive they cannot be a good trade-mark, even if there has been a monopoly of their use. This rule has been established in cases where a new patented article has been brought out under a new name. The name denotes the thing, and while only the patentee can make the thing he has a monopoly of the name, but when the patent comes to an end anybody may make the thing and may sell it under that which is its only name: *Linoleum Manufacturing Company* v. *Nairn* (1); *In re Palmer's Trade-mark* (2); *Singer Manufacturing Company* v. *Wilson* (3); *Singer Manufacturing Company* v. *Loog* (4). *A fortiori* may the words here be used when they are descriptive of an article which any person at *Stone* may make. We admit that if we use the words "*Stone Ale*" we must use them in such a way as not to lead people to believe that they are purchasing the complainants' goods; but that does not authorize such a monopoly as is now claimed. Can it be said that the first person who brewed ale at *Burton* could have monopolized the description of "*Burton Ale?*" The meaning of trade-mark is, that it is a mark which a particular firm has the right of attaching to its goods to shew them to be the manufacture of that firm, and "*Stone Ale*" is not distinctive, being the correct description of any ale made at *Stone* by whomsoever made. As regards the injunction, the same remarks apply. The cases *Siegert* v. *Findlater* (*Angostura Bitters*) (5); *In re Palmer's Trade-mark*; *In re Leonard and Ellis's Trade Mark* (*Valvoline*) (6); *In re Wood's Trade-mark* (7); *In re Hudson's*

(1) 7 Ch. D. 834.
(2) 24 Ch. D. 504.
(3) 8 App. Cas. 376.
(4) 8 App. Cas. 15.
(5) 7 Ch. D. 801.
(6) 26 Ch. D. 288.
(7) 32 Ch. D. 247.

C. A.
1889
THOMPSON v. MONTGOMERY.
In re JOULE'S TRADE-MARKS

Trade-marks (1), all lay down the same principles. All that the Plaintiffs make out is that they made ale at *Stone*, and that the public knew the ale as "*Stone Ale*," and knew that it was made by the Plaintiffs. In fact the evidence goes to shew that the public understood by it ale of a particular quality and price. All people who make ale at *Stone* have a right to tell the public that they do so, though they must not do so in such a way as to lead the public to suppose that their ale is made by the Plaintiffs. Mr. Justice *Chitty* relied on the *Glenfield Starch* case, *Wotherspoon* v. *Currie* (2), but the House of Lords appears to have gone mainly on the ground that there was no assignable motive for the defendants putting "*Glenfield*" on their labels, except an intention to pass off their goods as those of the plaintiffs. That case cannot apply unless the Plaintiffs can make out that they have a monopoly of the brewing trade at *Stone*. The Defendant is not bound to give any reason why he chooses to set up a brewery at *Stone*.

Romer, Q.C., and *Waggett*, for the Plaintiffs:—

[COTTON, L.J.:—We will hear you first on the question whether under the Act you can have "*Stone Ale*" as a trade-mark.]

We wish to enter into the question of fraud. The Court will not be favourably inclined towards a person who is guilty of fraud.

[COTTON, L.J.:—That is material on the question of the injunction, but it will not save your trade-mark, if it is not a good one.]

The Defendant is too late to have the trade-mark expunged. It is true that the notice of motion is wide enough to embrace expunging, but he never contended before Mr. Justice *Chitty* for a right to expunge. This case is governed by the *Glenfield Starch* case: *Wotherspoon* v. *Currie*.

The evidence of fraud is very clear. The Defendant first put up the words "*Stone Brewery*" simply, and then when he altered it to "*Montgomery's Stone Brewery*" he put up a device similar in general appearance to our red cross trade-mark: and he used a

(1) 32 Ch. D. 311. (2) Law Rep. 5 H. L. 508.

similar device in some of his public-houses, leading the public to suppose that the ale which he intended to sell would be our ale.

Sir *H. Davey*, in reply:—

Assuming that the Defendant did wrong, his wrongful acts do not enlarge the Plaintiffs' rights. We do not object to an injunction restraining the Defendant from doing anything which might deceive the public, but we contend that the Plaintiffs are entitled to no monopoly of the words "*Stone Ale*," and in particular that his registered trade-mark of "*Stone Ale*" simply ought to be expunged.

COTTON, L.J.:—

This is an appeal against an order made by Mr. Justice *Chitty*, which involves two questions. The first question is one on a motion made by the Defendant in the action under the *Trade Marks Act*, and that asks to qualify some of the trade-marks which were put on the register at the instance of the Plaintiffs in the action, and to rectify the register as may be thought fit. That applies to two kinds of trade-marks. The first kind of trade-mark is a trade-mark in which there is a good deal besides the words "*Stone Ale*," and there can be no objection to that trade-mark as a whole because it gives certain devices and other things which were put on the register by the owners of the brewery at *Stone*. There was in that no attempt to register "*Stone Ale*" as the trade-mark alone, but it was only a trade-mark having a cross, and various other things with reference to *Stone* Ales. What was asked, both as regards that and as regards another trade-mark simply of "*Stone Ale*" was that there should be a disclaimer made by the Plaintiffs of the exclusive right to the word "*Stone*," curiously enough not asking them to disclaim the exclusive right to the use of the words "*Stone Ale*," but only that they are to disclaim the exclusive right to the word "*Stone*." Well, that is rather remarkable, but we thought that where we could properly be asked to strike off the register a trade-mark which was not properly on the register, we should consider that point. With regard to those marks to which I have referred,

C. A.
1889
THOMPSON v. MONTGOMERY.
In re JOULE'S TRADE-MARKS.
Cotton, L.J.

which are the first five, those come under one class, and the registration of "*Stone Ale*" comes under another.

Ought we to require the Plaintiffs to disclaim, as we are asked to do? One can quite see that this is done in order to gain an advantage to the Defendant in any application which may be made for an injunction to restrain the use of the words "*Stone Ale.*" But, independently of that, in my opinion, we ought not to modify in such a way the registration of those marks with the words "*Stone Ale,*" and something additional. We ought not to do that. This application is under sect. 74 of the Act of 1883. So far as relates to the registration of marks other than "*Stone Ale*" alone, there is nothing in that section applicable to the case, nor any ground of objection to the registration.

The case is different with reference to the registration of "*Stone Ale*" as a separate trade-mark. There is no evidence, as far as I can see, that "*Stone Ale*" had been used as a trade-mark before August, 1875, though undoubtedly it had been used in ordering goods from the Plaintiffs, and in selling goods to customers, that is to say, by those who bought from them, as a description of the ale made by the Plaintiffs, or of a particular class of their ale. I think it appears from the evidence, that "*Stone Ale*" was rather descriptive of a particular class, and "*Stone Ales*" descriptive of the ales generally which were made by the Plaintiffs, not referring to any particular class. That, I think, cannot be properly entered as a trade-mark in consequence of its not having been used as a trade-mark before August, 1875. It was laid down in the cases which have been referred to that in order to justify such a registration there must be the use not of a trade-mark, including that name, as in the case of the previous trade-marks registered by the Plaintiffs, but there must be the use of the word sought to be registered as a trade-mark solely and alone, as the trade-mark of the person applying. That has not been done in this case. The counsel for the Plaintiffs did not apparently wish it to stand over in order to produce further evidence. Therefore we must decide it on the evidence before us, and must order the Trade-Mark No. 74,764, which was registered in July, 1888, to be removed without costs either here or below. We cannot give

any costs, on the ground that that point was not raised in the Court below.

Now we come to the other part of the notice of motion, which was to discharge the injunction, or part of the injunction, granted by the learned Judge. The order restrained the Defendant until judgment or further order from carrying on the business of a brewer at *Stone* under the title "*Stone Brewery*" or "*Montgomery's Stone Brewery*," or any other title, so as to represent that the Defendant's brewery is the brewery of the Plaintiffs (there is no appeal against that), and from selling or causing to be sold any ale or beer not of the Plaintiffs' manufacture under the terms "*Stone Ale*" or "*Stone Ales*," or in any way so as to induce the belief that such ale is of the Plaintiffs' manufacture. The Defendant is not complained of for selling his ale under labels like, or only colourably different from, those of the Plaintiffs; but what he did was this. He began the construction of a brewery at *Stone*. He had a perfect right to do that; but then he put over the building which was being constructed, first the name "*Stone Brewery*," with the name of the builder who was erecting it. Now "*Stone Brewery*" was the name by which the Plaintiffs' brewery was known, not only in *Stone*, but in the neighbourhood of *Stone*, and in many other places as well. They had been established there for a long time. There was, I think, one other brewery there before, but it is not now there. That was the name of the Plaintiffs' brewery, and every one would write to them letters addressed to "*Stone Brewery*" or "*Brewery, Stone*," which is much the same thing. The Plaintiffs remonstrated with him, and then the Defendant put up over it, so as to mend the matter, "*Montgomery's*;" but then he adds what purports to be a trade-mark in a circle or garter, "*Stone Ale*," and then a letter like a long cross in red. Then he puts "trade-mark" outside that. That is rather making the matter worse. The cross was not the same as the cross of the Plaintiffs; the Plaintiffs' cross was more like a Maltese cross in red, and this was in red, but a long cross—a Latin cross. Then, not only does he do that, but he carries on the business of a licensed victualler in *Liverpool*, and over one of the places where he sells his beer, at a time when he could not be making any beer at *Stone*, he puts up "*Stone Ales*" as a trade-

C. A.
1889
THOMPSON v. MONTGOMERY.
In re JOULE'S TRADE-MARKS.
Cotton, L. J.

mark, like that which was on the top of his building, and he put up "*Montgomery's Branch Wine and Spirit Stores.*"

Was that other than a dishonest use of those words? It was not that he was labelling his bottles or casks of beer with a label like that of the Plaintiffs', but he was saying, "Here I am selling *Stone Ale.*" If that was bought from the Plaintiffs, there is nothing in the injunction to prevent him from doing that; but if he was not buying it from the Plaintiffs, he has not even the excuse of saying, "I made those ales at *Stone*, and therefore I am speaking the truth when I say I am selling *Stone Ales.*" In fact he was representing, and intending to represent, that the ales he was selling, at a time when he was in such a position as regards his brewery that he could not make any ales at *Stone*, were "*Stone Ales*," which can only mean the ales of the Plaintiffs.

The case of the *Glenfield Starch, Wotherspoon* v. *Currie* (1), was relied upon by Mr. Justice *Chitty*, but this case goes very much further than that. In the *Glenfield Starch* case the defendant did not call his starch the only *Glenfield* starch, but he put at the bottom of his label, which was affixed to every packet of starch, "*Fulton and Company's Glenfield Starch, Glenfield.*" There he had much greater excuse, for he might say, "I am making the starch at *Glenfield*, and that is what I represent." The House of Lords thought, and rightly, that he was simply doing that for the purpose of representing that the starch which he was selling was the *Glenfield Starch*, that is, the starch made by the plaintiff, which had acquired the name of "*Glenfield Starch*," more fully perhaps than the name of "*Stone Ale*" had been acquired here, because, as Sir *Horace Davey* has pointed out, although their manufactory was started at *Glenfield*, they had moved to larger premises at another place, some distance from *Glenfield*, still calling their starch "*Glenfield Starch.*" But the principle is the same. The House of Lords held that the defendant was putting the word "*Glenfield*" on his labels fraudulently and with the intention of making out that his starch, though he did not call it "*Glenfield Starch*," was the starch of the plaintiff, who had by user acquired the right to the name of "*Glenfield Starch.*"

In my opinion, therefore, the injunction is right. It is cer-

(1) Law Rep. 5 H. L. 508.

tainly right as regards an interlocutory injunction, because it was probable that this brewery would be in operation shortly; but in my opinion it would be right, even if this were the hearing of the action, because when we find that the Defendant has, without any honest purpose, exhibited those cards at his place of business—when we look at what he has done at *Stone* itself, we cannot but hold that he is using fraudulently the name which he has there put up at his shop and brewery in order to represent that his ales are the ales made by the Plaintiffs.

In my opinion, therefore, the appeal fails.

LINDLEY, L J.:—

I am of the same opinion. As regards rectification of the register, the notice of motion before Mr. Justice *Chitty* did not in terms seek to rectify the register by striking out No. 74,764, although an order to that effect might have been made by the Judge, if he had been asked to make it, under the general words at the end of the notice of motion, those general words being that such further or other order may be made for the rectification of the register as to the Court shall seem just. But that was not what the applicant wanted. What the applicant wanted and asked for by his notice of motion was something totally different, and that was to compel the Plaintiffs to disclaim, or, in other words, to discontinue the use of the word "*Stone*" in any one of the six trade-marks which they had registered. That application was made under sect. 74 of the *Patents, Designs and Trade Marks Act* of 1883, and it appears to me that the application is not warranted by the section. The section only applies where there are words and figures, or other marks common to the trade. Nothing, I apprehend, can be common to the trade which is used only by one person in the trade. We have not any such words as "*Stone Ale*" common to any trade, but they were exclusively used by the Plaintiffs in their trade, and it appears to me that that section does not apply at all, and that its language does not fit the case.

Then as regards the general words at the end of the notice of motion. Sir *Horace Davey* has asked us to rectify the register by striking out that one entry of "*Stone Ale*" alone. Whether

C. A.
1889
THOMPSON v. MONTGOMERY.
In re JOULE'S TRADE-MARKS.
Lindley, L.J.

that is right or wrong does not depend upon the section I have mentioned, but upon section 64, which requires that a trade-mark to be registered by reason of its being used before August, 1875, shall be some special and distinctive word. Now, having regard to that language, and to the interpretation which has been put upon it by the Court, in a great number of cases to which our attention has been called, it appears to me that Sir *Horace Davey* was right upon that, and that the register ought to be rectified by striking out that particular trade-mark. But inasmuch as that does not form part of the notice of motion, and had not been brought forward until after the matter had got into very skilful hands at a late stage upon the appeal, I quite agree that it is right that there should be no costs of that application either here or in the Court below.

We have given the Defendant his rights in that respect, and we have given them, not for his sake—at least I have not—but because it was the duty of the Court, when its attention was called to the improper entry upon the register, to rectify upon an application being made; and for the purpose of keeping the register right I have come to the conclusion that we ought to rectify it.

Now we come to the other part of the case, upon which the Defendant's personal character is much affected. It is very important to him, because what we are asked to do is this. We are asked to restrain him from using, in connection with any ales sold by him, the words "*Stone Ale.*"

The Plaintiffs' rights are to prevent anybody from passing off his goods as the goods of the Plaintiffs. Sir *Horace Davey* says that the Plaintiffs have no exclusive right to the use of the words "*Stone Ale*" alone. Perhaps not as against the world. He says that the Plaintiffs have not any right to prevent the Defendant selling his goods as having been made at *Stone*; I am not prepared to say that they have. But as against a particular Defendant who is fraudulently using, or going to fraudulently use the words with the express purpose of passing off his goods as the goods of the Plaintiffs, it appears to me that the Plaintiffs may have rights which they may not have against other traders. In regard to that proposition, it appears to me that

the *Glenfield Starch* case (1) has an extremely important bearing upon this case. The evidence in this case convinces me that any ale which may be sold by this particular Defendant as "*Stone Ale*" will be intended by him to be passed off as the Plaintiffs' ale. I am satisfied that he does not use the words "*Stone Ale*" for any honest purpose whatever, but according to the evidence with a distinctly fraudulent purpose.

Is there any reason, then, why the Court should not deal with him accordingly, and prevent him from carrying out such intention by restraining him from using the words which he will only use for that purpose? In my opinion the *Glenfield Starch* case warrants us in going that length as against this particular Defendant.

It appears to me, therefore, that the appeal fails, and ought to be dismissed with costs

LOPES, L.J.:—

I am entirely of the same opinion. I have nothing to add.

It was agreed by the parties that the hearing of the motion should be taken as the trial of the action, and the injunction was accordingly made perpetual.

Solicitors: *Chester & Co.*, agents for *Fishwick, Stone; Ridsdale & Son*, agents for *Bradley & Son, Liverpool.*

(1) Law Rep 5 H L 508.

M. W.

C. A.
1888
KAY, J.
Nov. 2.
C. A.
1889
Feb. 22, 26.

In re YEADON LOCAL BOARD AND YEADON WATERWORKS COMPANY.

Local Board—Arbitration—Umpire—Time for making Award—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 180, *sub-s.* 9 [*Revised Ed. Statutes, vol. xvii., p.* 578].

Although no original limit of time is specially mentioned in the *Public Health Act*, 1875, within which an umpire must make his award, yet by analogy to the original limit fixed in the case of arbitrators, an original limit of twenty-one days from the date of the reference to him must be inferred to have been fixed in the case of an umpire; which, under sect. 180, sub-sect. 9, may not be extended beyond two months.

Two arbitrators appointed under the *Public Health Act*, 1875, met on the 3rd of January, and extended the time for making their award till the 20th of February. On the 10th of January they appointed an umpire. On the 1st of February the arbitrators and umpire met, and were attended by the parties, but one of the arbitrators retired and refused to proceed any further, and the meeting was adjourned *sine die*. On the 19th of April the umpire made his award:—

Held (reversing the decision of *Kay*, J.), that the award was made too late, and must be set aside:

Held, also, that the date from which the twenty-one days must be reckoned was the 1st of February, when the arbitrators finally disagreed, and not the 20th of February when their powers expired.

THIS was a motion by the *Yeadon Waterworks Company* to set aside the award made in an arbitration between themselves and the Local Board of *Yeadon* in the *West Riding* of *Yorkshire*.

The *Yeadon Waterworks Company* was in 1820 incorporated by a special Act of Parliament. In 1887, owing to the great drought in the summer of that year, the company had great difficulty in supplying their district with water. In July, 1887, the local board asked the company whether they would be willing to sell their undertaking to the board, and, if so, on what terms. This application was followed on the 8th of July by a formal notice from the board under sect. 52 of the *Public Health Act*, 1875, requiring them to supply each house in their district with water suitable and proper for drinking and ordinary domestic purposes at the rate of twenty gallons per head per day. The offer of purchase was declined by the company, who insisted that they were using

their best endeavours to maintain a sufficient water supply. Ultimately, on the 15th of December, 1887, the board served the company with notice of the appointment of an arbitrator under sects. 179 and 180 of the *Public Health Act*, the notice being intituled in the matter of the Act "and of a difference as to whether the water which the company are able and willing to lay on is proper and sufficient for the purpose for which it is required within the district of the *Yeadon Local Board.*" On the 22nd of December the waterworks company appointed an arbitrator on their part. On the 3rd of January, 1888, the two arbitrators met and extended the time for making their award till the 20th of February. On the 10th of January they appointed Mr. *S. Jackson* their umpire. On the 25th of January the arbitrators and the umpire signed a joint notice of a meeting on the 1st of February. On that day the arbitrators and the umpire met, the umpire presiding, and were attended by the solicitors for the local board and the company. The solicitor for the company endeavoured to limit the inquiry to the question whether the board was bound to provide water at the rate of twenty gallons per head per day, according to the notice of the local board. This was contested by the solicitor to the local board, whereupon the solicitor for the company and the arbitrator appointed by the company withdrew, and took no further part in the arbitration. Then the other arbitrator and solicitor refused to go on, and urged the umpire to proceed, but he declined to do so at that time, and the meeting was adjourned *sine die.* On the 31st of March, 1888, the umpire gave notice that he would proceed with the arbitration on the 16th of April. On that day he held a meeting, but the solicitor for the company did not attend. On the 19th of April the umpire made his award "that the *Yeadon Waterworks Company* were not able and willing to supply water proper and sufficient for the purposes set out in the notice of the 8th of July, 1887, or for the requirements of the local authority, and that the water, which the said company were able and willing to lay on, was not proper and sufficient for the purposes of the said requirements;" and he ordered the cost of the reference and award to be borne by the company.

The company served a notice of motion to set aside the award

C. A.
1889
In re YEADON LOCAL BOARD AND YEADON WATERWORKS COMPANY.

on various grounds, the principal of which were, first, that the award was not made within the time required by the *Public Health Act*, 1875 (1); and, secondly, that the main question whether a supply of twenty gallons per head per day was reasonable, had not been gone into by the umpire.

The motion was heard before Mr. Justice *Kay* on the 2nd of November, 1888.

Sir *H. Davey*, Q.C., *Renshaw*, Q.C., and *Eyre*, for the *Yeadon Waterworks Company*.

Marten, Q.C., *Rigby*, Q.C., and *F. T. Procter*, for the *Yeadon Local Board*.

KAY, J. (after stating the facts, continued):—

The first question is, what am I to take to be the date of the reference of the matters to the umpire. No doubt the company consider that it was the 25th of January. I do not find that there was any formal reference to the umpire as distinguished from the arbitrators on that day at all. It only then became pretty evident that the arbitrators were not inclined to agree, and they were present at the meeting of the 1st of February; and I think the fair result of that meeting was that all parties considered that the umpire was not to take up the reference until the extended time, namely, up to the 20th of February, within which the arbitrators had appointed to make their award, had elapsed. I have

(1) 38 & 39 Vict. c. 55, s. 180 (6): "If a single arbitrator dies or becomes incapable to act before the making of his award, or fails to make his award within twenty-one days after his appointment, or within such extended time, if any, as may have been duly appointed by him for that purpose, the matters referred to him shall be again referred to arbitration under the provisions of this Act, as if no former reference had been made.

(8.) "If the arbitrators fail to make their award within twenty-one days after the day on which the last of them was appointed, or within such extended time (if any) as may have been duly appointed by them for that purpose, the matters referred shall be determined by the umpire.

(9.) "The time for making an award by arbitrators under this Act shall not in any case be extended beyond the period of two months from the date of the submission, and the time for making an award by an umpire under this Act shall not in any case be extended beyond the period of two months from the date of the reference of the matters to him."

no evidence before me which satisfies me that there was a reference to the umpire as distinguished from the arbitrators before the 20th of February, and that being so, his award was within the two months which sub-sect. 9 of sect. 180 allowed him to make the award. Therefore I do not accede to the objection on the point of time.

His Lordship then considered that the company had not established their second objection, and dismissed their application with costs.

C. A.

The *Yeadon Waterworks Company* appealed from this decision. The only question argued before the Court of Appeal was whether the award was made within the time limited by the Act.

The appeal came on to be heard on the 22nd of February, 1889.

Sir *H. Davey*, Q.C., *Renshaw*, Q.C., and *Eyre*, for the Appellants:—

We say by way of preliminary objection that the award was out of time, and must be set aside on that ground independently of the merits. Mr. Justice *Kay* considered that sub-sect. 9 of the *Public Health Act*, 1875, s. 180, is the only provision that regulates the time within which the award is to be made, but the time is in fact regulated by sub-sect. 6; the umpire, who comes under the expression "single arbitrator," must make his award within twenty-one days, or such further time as he appoints, subject to the enactment in sub-sect. 9 that the time is not in any case to exceed two months from the date of the reference to him. That means from the time when he was appointed umpire: *Kellett* v. *Local Board of Health of Tranmere* (1).

[LINDLEY, L.J.:—Was not that decision doubted in *Warburton* v. *Haslingden Local Board* (2).]

Not on this point. Here the umpire never enlarged the time, so he was limited to twenty-one days. But suppose there is no limit other than that imposed by sub-sect. 9, still the award is out of time, for more than two months elapsed from the time when the arbitrators and umpire sat together, which is the latest time from which it is possible to reckon.

(1) 34 L. J. (Q.B.) 86. (2) 48 L. J. (C.P.) 451.

C. A.
1889
In re YEADON LOCAL BOARD AND YEADON WATERWORKS COMPANY.

Marten, Q.C., *Rigby*, Q.C., and *F. T. Procter*, for the Local Board:—

The Act throughout draws a distinction between an umpire and an arbitrator, and sub-sect. 6, which speaks only of a single arbitrator, cannot be applied to an umpire. Till we come to sub-sect. 7 the section deals only with arbitrators. That sub-section provides for the appointment of an umpire. Sub-sect. 8 prescribes that if the arbitrators do not make their award within twenty-one days, or the extended time which they have appointed, the matters shall be determined by the umpire. So far we have nothing as to the time within which the umpire must make his award. Then sub-sect. 9 says that the time for making an award by the arbitrators shall not be extended beyond two months from the submission. No time is fixed for the umpire except by saying that his time shall not be extended beyond two months from the date of the reference to him. *Kellett* v. *Local Board of Health of Tranmere* (1) was decided under the Act of 1848, which expressly defined the times for umpires by reference to those for arbitrators; that provision has been omitted in the present Act. Throughout the rest of the section arbitrators and umpires are distinguished. *Skerratt* v. *North Staffordshire Railway Company* (2), on analogous provisions in the *Lands Clauses Act*, lays down that the time given to the umpire begins to run only from the end of that given to the arbitrators, and the same view appears to have been taken in *Holdsworth* v. *Wilson* (3). In *In re Bradshaw's Arbitration* (4) *Skerratt's Case* is pointedly approved of. The reference of the matters to the umpire cannot be considered to take place at the time of his appointment, when it is uncertain whether he will ever have to act; if the date of his appointment was intended it would have been simpler to say so. Where arbitrators must appoint an umpire before they commence the arbitration, their award is not invalidated by his sitting with them: *Winteringham* v. *Robertson* (5). This is a manifestly convenient rule, as it enables the umpire to hear the evidence, so that if he is called upon to act he has not to take

(1) 34 L. J. (Q.B.) 86.
(2) 17 L. J. (Ch.) 161.
(3) 4 B. & S. 1.
(4) 12 Q. B. 562.
(5) 27 L. J. (Ex.) 301.

it again. This is a common practice: *Russell* on Arbitration (1); *Flag Lane Chapel* v. *Mayor of Sunderland* (2). The Act says that the umpire is to determine the matters if the arbitrators do not make their award within a specified time; it gives him no power to make an award until after the expiration of the time within which the arbitrators could make it; the "reference of the matters to him," therefore, cannot take place until the power of the arbitrators to make an award is gone; he cannot be brought into action before the time by their saying that they disagree. This was taken for granted in *In re Mackenzie and Ascot Gas Company* (3). Mere acceptance of the office is not entering on the reference: *Russell* on Arbitration (4).

[COTTON, L.J.:—How do you construe "shall not in any case be extended" in sub-sect. 9?]

We construe it as meaning "shall not extend."

Sir *H. Davey*, in reply.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Kay*, and there is a preliminary objection taken which is one that, if it succeeds, will render it unnecessary to go into the other question, namely, that the time limited by the Act for the umpire making the award had passed before he made the award which is relied upon by the Respondents.

Now there are two matters brought before us. First, it is said that there must be an original limited time within which the umpire must exercise the powers if at all; and that if there is, and if there is any extension of that original limited time, the time for which it could be extended had elapsed before he made his award. The question turns on sub-sect. 9 of sect. 180, which refers to this matter, and it is this: "The time for making an award by arbitrators under this Act shall not in any case be extended beyond the period of two months from the date of the submission, and the time for making an award by an umpire under this Act shall not in any case be extended beyond the period

(1) 6th Ed. p. 247.
(2) 5 Jur. (N. S.) 894.
(3) 17 Q. B. D. 114.
(4) 6th Ed. p. 140.

C. A.
1889
In re YEADON LOCAL BOARD AND YEADON WATERWORKS COMPANY.
Cotton, L J.

of two months from the date of the reference of the matters to him." Here it speaks of extension of time. It is perfectly clear as regards the arbitrators that it means to extend an originally limited time, and as regards the arbitrators there is no difficulty at all, for by sub-sect. 8 the Act of Parliament in terms limits the time to twenty-one days from the date of the appointment. Then can we in the latter part of this sub-section put a different meaning on the term "extended" from that which is given, and necessarily given, to it in the first part of the sub-section? I am of opinion that that would be a wrong way of construing the Act When it speaks of extending time (and I pointed that out to counsel for the Respondents several times) in my opinion you must necessarily infer that there is an original limited time, because if there is no original limit there is no necessity for extension. It is said that the meaning of this is that the time of the umpire making his award shall not "extend," not "be extended," beyond two months from the date of the reference of the matters to him, that is to say, that he shall have two months, and no more, from the date of the reference. I think that is not the proper construction of the words used here; and, in my opinion, the Appellants are right in saying that this necessarily implies an original limit of the time during which the umpire may make his award. But when we go back to sub-sect. 6, I think we cannot find there any limit as applicable to the umpire, because the provisions of that sub-section refer in terms to a single arbitrator, and cannot be applied to an umpire, because there the limited time is twenty-one days after his appointment, and that cannot be the case as regards the umpire. Therefore, I do not think it would be right to construe sub-sect. 6 as if it in terms applied the original limited time to the umpire.

But what ought we to do? It is perfectly clear to my mind that the framers of the Act considered there was a time limited originally for the umpire to exercise his powers, which might be extended, in the proper sense of the word, by extending the original limited time. There is no clause in the Act expressly limiting the time during which the umpire is to act, but in my opinion it would be right on our part to act by analogy to that which is the limited time given to the arbitrators, namely, the

date of appointment. Then the limit must be twenty-one days from the time when the reference of the matters to the umpire took place.

This being so there can be no doubt that that time had expired before the award was made. But I think we ought to give our opinion on the other question which was brought before us, namely when the reference was made to the umpire; and I think that would be on the 1st of February at the latest. Before that time I do not think there was anything which could be said to be a reference of the matters in dispute to the umpire. But it is contended on behalf of the Respondents here that the only possible reference of matters to the umpire would be after the neglect of the arbitrators for the time limited, the twenty-one days, or the extended time of two months, to exercise their powers. In my opinion that is not the proper construction of the Act of Parliament. This Act of Parliament, where it lays down any limit or gives any direction as to the mode in which the powers of the umpire and arbitrators are to be exercised, speaks for itself, and it is the law applicable to these arbitrators and to this umpirage; but it does not do away with, except where it expressly says so, or by necessary implication does so, the general law applicable to arbitrators and to umpires. In my opinion it is tolerably clear that if an agreement between the two arbitrators is hopeless, then the umpire can, as under an ordinary reference to arbitration, make his award, subject to this: That if the arbitrators came together and agreed within the time limited for the exercise of their powers, his award would not be effectual, being ousted by an award made by the arbitrators within the limited time given to them.

Now was there not a reference of the matters to the umpire on the 1st of February? We have had his evidence, and what we know is this, that the arbitrators did not seem very hopeful about coming to any agreement as to the matter which they had to decide, and therefore on the 25th of January there was a notice signed by all three calling a meeting for the 1st of February. The umpire attended there; the two arbitrators attended there; but during the progress of the discussion the arbitrator appointed by the company retired, and would have

C. A.
1889
In re YEADON LOCAL BOARD AND YEADON WATERWORKS COMPANY.
Cotton, L. J.

nothing more to do with it. Then the other arbitrator, and the solicitor acting for the local board, said they would have nothing more to do with it, and urged Mr. *Jackson* to go on. Mr. *Jackson* thought that his powers would not begin till after the 20th of February, the extended time named by the arbitrators. I think there he was wrong. He had a perfect power to go on, unless the arbitrators ousted any award made by him by agreeing and making an award themselves. Then, what does Mr. *Jackson* say in his evidence? He says, at the request of the arbitrators he signed the notice of the 25th of January. "I was to sit as umpire at that meeting." Then he goes on speaking of what took place at the meeting on the 1st of February, and what he says is this:—"On that occasion I sat as umpire and presided. The speeches of the solicitors were addressed to me. I could not say if I was addressed as 'Sir.' I took part in the proceedings as umpire, and considered myself in that position." Then he says at *Leeds* he sat alone. According to his own statement he attended and sat there as umpire. I do not see that there was any reference to him until the final decision of the company's arbitrator that he would not go on any further; but when he did that, and when he was requested by the solicitor of the board to go on (evidently to go on as umpire, and in no other capacity), there was, in my opinion, a reference in consequence of the disagreement of the arbitrators to him before the 20th of February, of the matters in question. Even if he had not originally a limit to his jurisdiction of twenty-one days, the two months would expire on the 1st of April, and he did not make his award until the 19th of April.

In my opinion, therefore, this preliminary objection is fatal, and we must discharge the order.

LINDLEY, L.J.:—

I have come to the same conclusion. It is very difficult to construe the 9th sub-section of the 180th section of the *Public Health Act*, and the difficulty arises from there being an obvious blunder. The question is, what we are to do. We must put some construction on the section, and must come to some decision as to what it means. The frame of the section, so far as we have got to deal with it, appears to be this: The section refers to

arbitration in cases of dispute arising under the Act itself. It provides for the appointment of one arbitrator; it provides for the appointment of more than one arbitrator; and it provides for differences arising where there are more than one, and for the decision of those differences by an umpire. It says in sub-sect. 6, if there is a single arbitrator his award is to be made within twenty-one days after his appointment, or within such extended time, if any, as may have been duly appointed by him. It says, with reference to several arbitrators, that if they fail to make their award within twenty-one days after the day on which the last of them is appointed, or within such extended time, if any, as may have been duly appointed by them for that purpose, the matter shall be referred to an umpire. In both cases we find a period of twenty-one days within which the award is to be made, with power to the single arbitrator in one case, or the plurality in the other to extend the time. We do not find anything of the sort with respect to umpires. There is nothing of the kind said. Then comes the sub-section with which we have to deal, which applies both to arbitrators and to umpires. The beginning of the sub-section runs thus; "The time for making an award by arbitrators under this Act shall not in any case be extended beyond the period of two months from the date of the submission." That is intelligible enough. A time has been fixed for their award, and there is power to extend it given to them; and then this section says in language which is plain enough, subject to one remark, that "the time shall not in any case be extended beyond two months." That language itself has given rise to a question whether, having regard to the provisions in the *Common Law Procedure Act*, it means that the time shall not be extended by the arbitrators, or that the time shall not be extended even by the Court under the powers contained in the *Common Law Procedure Act?* There are two decisions which appear to me to be irreconcilable on that part, but we need not trouble ourselves with this point because it does not arise. Then comes the second part of the sub-section, which uses precisely the same language, and applies it to the award of the umpire: "and the time for making an award by an umpire under this Act shall not in any case be extended beyond the period of two months from the date of the

C. A.
1889
In re YEADON LOCAL BOARD AND YEADON WATERWORKS COMPANY.
Lindley, L J.

reference of the matters to him." So that we have two months, which is to be the extreme limit, in both cases. The language used as regards the umpire is the same as the language used with regard to the arbitrators; but, as I have already pointed out, there is nothing said in the Act about the necessity for his making an award within twenty-one days, or within any time to which it may be extended.

Now the question is what are we to do? It is contended, on the one hand, we ought to read it in this way, that the umpire may make his award at any time within two months after the date of the reference. It is contended, on the other, that there is a necessary implication here of the limit to which it is to be extended. I think the true view is the last, that there is and must be a necessary implication. What is the limit? I can find no limit except the twenty-one days, which has been referred to in the two previous sub-sections. It appears to me, therefore, that this puzzle, which arises out of a blunder, must be unravelled in that way. We must solve this problem as we have to solve a great many others, by recurrence to general principles; and I think the true principle here is to imply a period of twenty-one days.

That construction renders it unnecessary to consider whether the time is to run from the 1st of February or from the 20th of February. At one time I thought the time ought to run (be it twenty-one days or be it two months), from the 20th of February, but I am bound to say, in the face of the evidence given by the umpire, that the time, whatever it may be, ought to run from the 1st of February; because he says distinctly, in language which is quite incapable of being misunderstood, that he did then act as umpire. He had been appointed on the 10th of January; he had on the 25th joined in giving notice for a meeting on the 1st; he had signed the necessary declaration on the 31st, and on the 1st he tells us that he sat and acted as umpire, not, as I thought might have been the case, simply for the purpose of listening to the evidence in order to avoid the necessity of taking it over again, but as umpire. It is very true that his functions as umpire might have been determined if the two arbitrators had subsequently agreed and made an award

within the time, that is to say, before the 20th of February; but they did not do it; therefore his award would be final.

It appears to me that this preliminary objection is one which cannot be got over, and that the appeal must be allowed.

LOPES, L.J.:—

It seems to me that the word "extended" in the latter part of sub-sect. 9 must have the same meaning as it has in the earlier part of that section. In the earlier part of the section the word "extended" clearly has reference to a period of twenty-one days. I think it must have the same meaning in the latter part. Therefore it comes to this, that the umpire's original time for making his award would be twenty-one days, but that time might be extended for two months. Now the period from which the twenty-one days or the two months is to run is the date of the reference to the arbitrators. Sub-sect. 8 appears to make it compulsory that the jurisdiction of the umpire is to arise on the failure by the arbitrators to make their award within the twenty-one days, or the two months, as the case may be. That does not mean that it is only to arise on such a failure. It is to arise in other circumstances. For instance, if the arbitrators cannot agree, or if one or both of them refuse to proceed, in such a case the jurisdiction would arise as it would arise under the ordinary law. I think, therefore, in this case that the period when it is to be taken that the matter was referred to the umpire was on the 1st of February. The evidence is strong to shew this. I cannot think that on the 1st of February the umpire sat merely to assist the arbitrators. At that time, having regard to what had taken place before, he sat as umpire.

In these circumstances, the time would run from the 1st of February, and as he did not make his award until the 19th of April, that award would be out of time.

Solicitors: *Jaques & Co.*, agents for *Watson, Dickons, & Watson, Bradford; Ullithorne, Currey, & Villiers.*

M. W.

C. A.
1888
STIRLING, J.
Nov. 17, 29.
C. A.
1889
March 1, 2, 4.

In re TOWRY'S SETTLED ESTATE.
DALLAS *v.* TOWRY.

[1888 T. 1906.]

Will and Codicil—Construction—Devise of Estate in succession—Gift of Chattels as Heirlooms—Gift of Income of Legacy by reference to Devise—Alteration of Devolution of the Estate by a Codicil—Reference in Codicil to the Legacy but not to the Heirlooms.

A testator after devising his *H. Lodge* estate to his cousin *H.* for life, then to *H.'s* wife for life, and then to their children successively in tail, and in default of issue to his cousin *F.* absolutely, or on the happening of a certain event, to his cousin *S.* absolutely, gave his household goods, and other things in and about *H. Lodge* to trustees, to permit the same to be held and enjoyed as heirlooms by the person or persons who for the time being should be entitled to *H. Lodge* under the devise thereinbefore contained, but so as the same should not vest in any tenant by purchase who should die under twenty-one without leaving issue. The testator then gave to the trustees a sum of £20,000 upon trust to invest for the benefit of the person or persons for the time entitled to the *H. Lodge* estate, or as near thereto as the different nature of real and personal estate would admit, and so as the income only be paid to the tenant for life of such estate, and so that no person or persons becoming entitled to the *H. Lodge* estate as tenant in tail should be entitled to an absolute interest in the fund until the age of twenty-one or dying under that age leaving issue. Power was given to grant leases of the estate, which might include the heirlooms. By a codicil the testator gave the *H. Lodge* estate to his cousin *H.*, and his wife and their children, and after them to the son of *C. L.* absolutely, and if he should die under age to another son, if any, and then to *F.* "as before," or on the happening of a certain event to *S.* and issue. After mentioning other properties, the testator said "£20,000 to trustees—the same as will," and except as therein intimated he confirmed his said will. There was no reference in the codicil to the heirlooms. The cousin *H.* and his wife died without issue. *C. L.* had one son, who had attained the age of twenty-one years, and on his behalf a petition was presented claiming the heirlooms, and the £20,000 absolutely:—

Held (reversing the decision of *Stirling*, J.), that notwithstanding the expression "under the devise hereinbefore contained," there was a governing intention shewn in the will that the chattels and the legacy of £20,000 should go with the *H. Lodge* estate: and that although the devolution of the *H. Lodge* estate was altered by the codicil there was no revocation of such governing intention: and that the Court would give effect to that intention by declaring the Petitioner entitled to the chattels and legacy.

Lord Carrington v. *Payne* (1) followed.

Martineau v. *Briggs* (2) distinguished.

PETITION AND SUMMONS.

George Edward Towry, who died in the year 1857, by his will

(1) 5 Ves. 404. (2) 23 W. R. 889.

made on the 15th of July, 1854, after appointing *Henry George Hopkins, Edward Philipps,* and *George Miles Cooper* to be trustees and executors thereof, and directing them to pay all his just debts (including the mortgage on his estate *Harewood Lodge*), said: "I give and devise all that my messuage or tenement called *Harewood Lodge,* with the fixtures thereto belonging, and also all my lands, tenements, and hereditaments situate in the parish of *Sunninghill,* in the county of *Berks,* and also all that my cottage, land, plantation, situate at *Ascot,* in the same county, with the appurtenances, and all other my lands (if any) in the said county of *Berks,* to the uses after mentioned, that is to say: To the use of my cousin *Henry George Hopkins* for his life, and after his death to the use of his wife *Sarah Hopkins* for her life, and after the death of the survivor to the use of the first and other sons of the said *Henry George Hopkins* severally and successively in tail, and in default of such issue, to the use of all and every the daughters of the said *Henry George Hopkins* as tenants in common in tail, with cross remainders in tail between them; and in default of such issue to the use of my godson and cousin *Francis Towry Adeane Law,* son of the Hon. *William Towry Law* (formerly Chancellor of *Wells*), his heirs, and assigns. But in case the said *Francis Towry Adeane Law* at the time of my death, or at any time after, shall be in communion with the Church of *Rome,* then the devise in favour of the said *Francis Towry Adeane Law,* his heirs and assigns, shall be absolutely void, and I thereupon give and devise all the said premises to the use of my cousin the Hon. *Henry Spencer Law,* his heirs and assigns. And I give and bequeath all the household goods, furniture, articles of vertu, china, glass, books, prints, pictures, and other household effects, in, about, or belonging to my said messuage or tenement called *Harewood Lodge* (except plate, linen, carriages, horses, and other live stock, and such pictures, books, and other effects as I may otherwise dispose of by this my will, or any codicil thereto) unto the said *Henry George Hopkins, Edward Philipps,* and *George Miles Cooper* in trust to permit the same to be held and enjoyed as heirlooms, so far as the rules of law or equity will permit, by the person or persons who for the time being shall be entitled to my

C. A.
1889
In re TOWRY'S SETTLED ESTATE
DALLAS *v.* TOWRY

said messuage or tenement called *Harewood Lodge* under the devise thereof hereinbefore contained, but so as the same shall not vest in any tenant by purchase who shall die under twenty-one without leaving issue." The testator directed his trustees after his decease, and from time to time, when occasion should require, to cause an inventory of the effects bequeathed as heir-looms to be made, and declared that the trustees should from time to time, as they should think fit, examine the state and condition of the effects and cause such reparations, restorations, and replacings thereof to be made as they should think proper; and then, after making various specific and pecuniary bequests, he bequeathed the legacy following:—"I give and bequeath to my trustees, their executors, administrators, and assigns, the sum of £20,000 upon trust that they, my said trustees, their executors, administrators, and assigns, do and shall with all convenient speed after my decease lay out and invest the same in their names in the parliamentary stocks or public funds of *Great Britain*, or at interest upon Government or real securities, such real securities to include copyholds of inheritance and leaseholds held for an unexpired term of not less than sixty years, or upon bonds, debentures, or shares of any joint stock company in *England* or *Wales*, incorporated by Act of Parliament or royal charter, and do and shall from time to time by the direction of the person for the time being entitled thereto for life, to be testified by some writing under his or her hand, and after the decease of such person or persons at the sole discretion of my said trustees or trustee, vary and transpose such stocks, funds, or securities as aforesaid for others of the same or the like nature, and do and shall stand and be possessed of such funds and securities, and the dividends, interest, and annual produce thereof, upon trust for the person or persons for the time being entitled to my estate called *Harewood Lodge*, or as near thereto as the different nature of real and personal estate will admit, and so as the income thereof only be paid to the tenant for life of such estate, and so that no person or persons becoming entitled to my said estate of *Harewood Lodge* as tenant in tail by purchase shall be entitled to an absolute interest in the *corpus* of the said stocks, funds, and securities, unless or until

he, she, or they shall attain the age of twenty-one years or die under that age leaving issue, and until such investment of the said sum of £20,000 shall be made as aforesaid, interest after the rate of 4 per cent. per annum as from my death shall be payable thereon out of my general personal estate for the benefit of the person or persons who would have been entitled to the dividends and income of the said sum of £20,000 in case the same had been invested."

The testator then made various further bequests of legacies in trust, and gave all the residue of his real and personal estate unto his cousins the said *Henry George Hopkins* and *Frederick Hopkins*, their heirs, executors, administrators, and assigns, as tenants in common, if they both should survive him, but if either should die in his lifetime the one surviving him should take the whole; and he empowered the trustees, and the persons thereinbefore made tenants for life of the estates, to demise or lease the same for terms of years as therein mentioned, and directed that in any lease or leases to be granted of the said messuage, or tenement, or premises called *Harewood Lodge*, the same might include the furniture and other effects thereinbefore bequeathed as heirlooms and to go therewith. The testator made two codicils to his will, one dated the 15th of July, 1854, bequeathing a pecuniary legacy, and in other respects confirming the will; and the second made shortly before his death, and dated the 22nd of October, 1857, which, so far as related to the devised estates, heirlooms, and legacy of £20,000, was as follows:—

"I, *George Edward Towry*, of *Harewood Lodge*, Esquire, devise and bequeath my estates and lands at *Harewood* and *Ascot*, and the other estates in *Berks*, to *Henry George Hopkins*, and *Sarah*, and children, after to the son of *Charles Law*, Colonel of 66th Regiment absolutely, if he dies before age to another son, if any, and to *Francis Towry Adeane Law* as before, or if Roman Catholic, to *Henry Spencer Law* and issue.

"Advowson of *Margaretting* . .	The same as will.
"*Sea Street Farm*	The same.
Half of Mrs. *Fellows* . . .	The same.
£4000 *Henry Morden Bennett* and *Edward Philipps* . . .	The same.

C. A.
1889
In re TOWRY'S SETTLED ESTATE. DALLAS *v.* TOWRY.

18, *Clifford Terrace* . . .	The same.
£20,000 to Trustees . . .	The same.

* * * * *

"This is to be taken as a codicil to my will, which will bears date the 15th day of July, 1854, and except as here intimated I confirm my said will."

The will and codicils were proved by the executors on the 20th of January, 1858. *Henry George Hopkins* died on the 20th of December, 1870, and the Defendant, the Rev. *F. Hopkins*, was the executor of his will. *Sarah Hopkins*, the widow of *H. G. Hopkins*, died on the 18th of June, 1886, without leaving issue. The Hon. *Charles Towry Hamilton Towry Law* was the only son of the said *Charles Law* (now Lord *Ellenborough*). He attained the age of twenty-one years on the 21st of April, 1877, and was a person of unsound mind, so found by inquisition. Lord *Ellenborough* had been duly appointed the committee of his person and estate, and he presented a petition; the lunatic being, on application made in Court, for that purpose, made a party to the proceedings, by which he claimed that the lunatic was absolutely entitled to the legacy of £20,000, and to the heirlooms devised and bequeathed by the will. Parts of the estate and some of the heirlooms had been sold, and the proceeds paid into Court. The other parties, or some of them, interested contended that the lunatic was not so entitled. The trustees took out a summons, and asked for a declaration (1) who was the person entitled on the death of *Sarah Hopkins* on the 18th of June, 1886, to the legacy of £20,000 bequeathed by the will and second codicil; (2) who was the person entitled on her death to the heirlooms bequeathed by the will, and remaining unsold; and (3), how the costs were to be paid; and the petition and summons now came on to be heard together. They came on for hearing before Mr. Justice *Stirling* on the 17th of November, 1888.

Fischer, Q.C., and *Cordery*, for the Petitioner:—

The questions to be determined are whether the heirlooms were or were not intended, as the testator explicitly stated, as it is submitted, to go with the estate; and whether the sum of money bequeathed was, or was not, to go in support of the family

who might become the owners of the estate. The testator by the second codicil did nothing more than alter the clause in his will by inserting a name before that of his godson and cousin, and the Court can give full effect to the will and codicil by reading the latter into the will. The real estate, the legacy and the heirlooms, were clearly linked together, and all devolved according to the limitations in the will and codicil construed as one document. In *Evans* v. *Evans* (1) there was a direction in a codicil that pictures and books in the mansion-house should pass therewith, and continue annexed thereto, and be enjoyed by the persons who should succeed to the estates under the limitations of the will, and it was held that the testator's object was that the chattels should go as heirlooms, and that the codicil was part of the will for all purposes. That decision is distinctly in point as regards the heirlooms. "Heirloom" is nothing else but a limb or member of the inheritance: *Williams* on Executors (2). The legacy was simply a bequest to the person or persons entitled to *Harewood Lodge*, and it will, as submitted, go in the same direction. In *Lord Carrington* v. *Payne* (3) the Master of the Rolls said (4) that the codicil did not revoke the devise of the real estate, and that the only alteration was in the mode of succession. The decision in that case has been commented upon in *Jarman* on Wills (5); and was discussed by Lord *Hatherley*, when Vice-Chancellor, in *In re Gibson's Trusts* (6), and by Vice-Chancellor *Wickens* in *Langdale* v. *Briggs* (7); but it has not been overruled.

Upon the authorities it is submitted that the Petitioner is, on behalf of the lunatic, the devisee of *Harewood Lodge*, entitled to a declaration in his favour, both as regards the heirlooms and the legacy, including the sums in Court.

Methold, for *F. T. A. Law*, the first devisee in the will in default of issue of Mr. and Mrs. *Hopkins*:—

I submit that either my client is entitled to this property —both the heirlooms and legacy—or that *H. S. Law*, the next

(1) 17 Sim. 86.
(2) 8th Ed. vol. i. p. 726.
(3) 5 Ves. 404.
(4) 5 Ves. 421.
(5) 4th Ed. vol. i. ch. 7, p. 180.
(6) 2 J. & H. 656, 668, 671.
(7) 21 W. R. 620.

C. A.
1889
In re TOWRY'S SETTLED ESTATE.
DALLAS v. TOWRY

devisee in the will, will be. There is a clear gift in the will to one of them of that property, and there is not a clear revocation of it by the codicil. The alteration made by the codicil only extended to the real estate. The case of *Evans* v. *Evans* (1) is as to the larger part of it not law now, being inconsistent with later cases. The decisions which I rely upon are those in *Doe* v. *Hicks*, in the House of Lords (2); *Darley* v. *Langworthy* (3); *Bridges* v. *Strachan* (4); *Francis* v. *Collier* (5); and *Martineau* v. *Briggs* on appeal in the House of Lords (6).

Haldane, for *H. S. Law*, or those claiming under him, adopted the argument on behalf of *F. T. A. Law*, and submitted that the decision in *Lord Carrington* v. *Payne* (7), if it were an authority at all, had nothing to do with this case.

Buckley, Q.C., and *Morshead*, for the Rev. *F. Hopkins*, the legal personal representative of *H G. Hopkins*, and who was also one of the residuary legatees, submitted that if the codicil was not read as part of the will he would be entitled to a share of this property as undisposed of, and therefore part of the residue. Certainly the devisees named in the will would not be entitled to it.

Pownall, for the trustees.

Fischer, in reply.

STIRLING, J.:—

The questions which arise on the petition and summons are, whether the Petitioner, the Hon. *Charles Towry Hamilton Towry Law* (a person of unsound mind, so found by inquisition, who appears by his committee, Lord *Ellenborough*) who became entitled under the second codicil to the will of the testator *George Edward Towry* to what is known as the *Harewood Lodge* estate, is entitled to certain chattels; and also to the benefit of the legacy of £20,000 which by the will of the testator was directed

(1) 17 Sim. 86.
(2) 8 Bing. 475.
(3) 3 Bro. P. C. 359.
(4) 8 Ch. D. 558.
(5) 4 Russ. 331.
(6) 23 W. R. 889.
(7) 5 Ves. 404.

to be held by the trustees upon trust for the benefit of "the person or persons for the time being entitled" to that estate. The material parts of the will are:—[His Lordship read them, and continued.]

The testator, after making a first codicil, on which nothing turns, made a second codicil which, so far as material, is as follows: "I *George Edward Towry*, of *Harewood Lodge*, Esquire, devise and bequeath my estates and lands at *Harewood* and *Ascot*, and the other estates in *Berks*, to *Henry George Hopkins* and *Sarah* and children after;" and here comes in the gift under which the Petitioner claims: "To the son of *Charles Law*, Colonel of the 66th regiment, absolutely, if he dies before age to another son, if any" (there is no other son), "And to *Francis Adeane Law* as before, or if Roman Catholic, to *Henry Spencer Law* and issue." Then the testator went on to make certain dispositions in the same way as by the will, concluding with "£20,000 to trustees the same," and said, "This is to be taken as a codicil to my will, which will bears date the 15th day of July, 1854, and except as here intimated I confirm my said will."

In the first place, I shall deal with the case so far as it relates to the chattels. I have to ascertain the meaning of the gift in the will so far as it relates to them. They are given to the trustees "in trust to permit the same to be held and enjoyed as heirlooms so far as the rules of law or equity will permit, by the person or persons who for the time being shall be entitled to my said messuage or tenement called *Harewood Lodge* under the devise thereof hereinbefore contained."

Who are the persons so indicated? It seems to me that those words are simply a compendious description of the person or persons by whom the chattels were to be enjoyed, and that they have the same effect as if the testator had there written out at length the names of the persons in succession who under the previous devise were to enjoy, successively, the estate called *Harewood Lodge*. In other words, as if instead of the words "by the person or persons who for the time being shall be entitled," and so forth, he had written, "by my cousin *Henry George Hopkins* for his life, and after his death by his wife *Sarah Hopkins* for life; and after the death of the survivor to the use of the

C. A.
1889
In re TOWRY'S SETTLED ESTATE.
DALLAS *v.* TOWRY.
Stirling, J.

first and other sons of the said *Henry George Hopkins* severally and successively in tail," and so forth.

There are several cases to which I might refer, shewing that that is the true mode of construing the gift, but I am content to refer to what is said by the Lord Chancellor, Lord *Cairns*, in the case of *Martineau* v. *Briggs* (1), in the House of Lords. In that case the testator by his will, having at the time of making it four daughters, devised his freehold property to them in a certain succession, making each of them a tenant for life, and giving to their sons, if they should have any (for they had none at the time), estates in tail male, and then he limited the ultimate remainder to his own right heirs. Then, having in addition to that freehold property, also copyhold and leasehold property, he made a gift of the copyholds by devising them to trustees, who were to hold them according to the custom of the manor; "but, nevertheless, upon, and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, and declarations as, regard being had to the different natures of the respective properties, will best or nearest correspond with the uses, trusts, intents, purposes, powers, provisoes, and declarations hereinbefore expressed and contained of and concerning the freehold manors, hereditaments, and premises hereinbefore devised." Upon that Lord *Cairns* said (2): "The effect of these words was just the same as if the testator had said. 'For the purposes to which we have at present to direct our attention, I direct my trustees to hold my copyhold property for my eldest daughter for life, then for the first and other sons of her body, and then for the second, third, and fourth daughter in like manner.'" That principle seems to me to be applicable to the present case. In the case of *Martineau* v. *Briggs* it was also applied to the leaseholds.

What is the effect of the second codicil? It simply altered the devolution of the *Harewood Lodge* estate, and it is silent altogether as to the chattels. What is the effect of that? I think it is shewn by the case of *Martineau* v. *Briggs* to be, that the disposition made by the will of those chattels still remained in force. The principle is laid down by Lord *Cairns*, when

(1) 23 W. R. 889. (2) 23 W. R. 890.

he said (1): "I venture to think it would be contrary to all principle and to all authority to hold here that devises and bequests of copyholds and leaseholds which, as your Lordships will have seen from what I read, were clearly devises and bequests to *personæ designatæ*, should be revoked without any reference to them specifically, and given to other persons—to persons who were not mentioned as taking them absolutely in the will at all—by the mere suggestion of an extreme inconvenience, which I admit to be an extreme inconvenience, of having the copyholds and leaseholds going in a different direction from the freehold property."

In opposition to that construction some cases have been cited. First, there was the case of *Lord Carrington* v. *Payne* (2).

That case seems to me to stand by itself. It has been repeatedly cited in other cases, but never, so far as I can discover, has it been followed. Many, perhaps most, of the Judges before whom it has been cited have stated that it was a case decided on a will framed in a very peculiar manner; that it might well be a good decision, expressing the true construction of that particular will, but that it had no application to the cases before them. It seems to me that the same remark is applicable here, the will in *Lord Carrington* v. *Payne* being framed in a totally different manner from that in the present case.

Another case which was cited is *Evans* v. *Evans* (3). It is a long case, but the material part of it, so far as is applicable to this case, will be found at page 108. There certain chattels in the testator's mansion-house were directed by the will to pass therewith, and continue annexed thereto, and be inherited and enjoyed by the several persons who should succeed to the real estate under or by virtue of the limitations of the will. By a codicil the limitations were altered, and the question was whether the persons who by virtue of the codicil took the real estate were also to take the chattels. There was not a lengthened argument, and no case was cited, but the point was mentioned, and the Vice-Chancellor said: "It is quite true that the testator has used the expression 'under or by virtue of the limitations of this my will.'

(1) 23 W. R. 891. (2) 5 Ves. 404.
(3) 17 Sim. 86.

C. A.
1889
In re TOWRY'S SETTLED ESTATE.
DALLAS *v.* TOWRY.
Sterling, J.

His object was that the chattels should go as heirlooms, and my opinion is that I must take the codicil to be part of the will to all intents and purposes."

The *ratio decidendi* there appears to be that the codicil must be taken to be part of the will to all intents and purposes. If that is to be read merely as an abstract proposition of law, and applicable to codicils in general, then it seems to be hardly in accordance with what was laid down by Lord *Cairns* in the case of *Martineau* v. *Briggs* (1). His Lordship there, after discussing the effect of the will, said (2): "That being the effect of the will, a codicil was made by the testator on the 12th of May, 1845, and that codicil commences with these words, which are very usual in an instrument of this kind: 'This is a codicil to be added to and taken as part of the last will and testament of me, the Right Hon. *Edward* Earl of *Oxford*.'" Then his Lordship went on to say: "I own, having heard all the observations made upon these words, I am unable to see that they amount to anything but a statement of that which would have been the effect in law of an instrument of this kind. A codicil always has to be added to a will. . . . The operation it may have on the will is to be ascertained by reading the words of the codicil in connection with what may be the wording of the will." If the meaning of the Vice-Chancellor in *Evans* v. *Evans* (3) was—and I think I must take it to have been his meaning—that the codicil in that case was to be taken as part of the will to all intents and purposes, he must have arrived at his conclusion as one derived from a true construction of the will, and, therefore, it comes back to the question of construction, and, the codicil in that case being different from this, is no authority binding upon me in the present case. Here I am unable to find anything in the second codicil which shews me that I am to take it as part of the will for all intents and purposes, and to read the words in the will "the person or persons who for the time being shall be entitled to my said messuage or tenement called *Harewood Lodge* under the devise thereof hereinbefore contained" as meaning the person or persons to whom by the words of the codicil the *Harewood* estate is devised.

It was then contended that the chattels were made heirlooms,

(1) 23 W. R. 889. (2) 23 W. R. 890. (3) 17 Sim. 86.

and so annexed to the land. That argument overlooks the latter words of the gift. They are not made heirlooms and annexed to the land to all intents and purposes, if that could be done, but only made heirlooms in order that they might be held and enjoyed "by the person or persons who for the time being shall be entitled to my said messuage called *Harewood Lodge* under the devise thereof hereinbefore contained." That is, they are made heirlooms in order that they may be enjoyed by certain *personæ designatæ*, among whom is not found the Petitioner, a devisee taking under the codicil. Then it was contended that if that be the true effect to be given to the will I should be disregarding the words of it, viz., that the only persons under it who can take are persons entitled for the time being to *Harewood Lodge*. I do not think that I can give effect to that argument. It appears to me in the first place to be contrary to the decision in the case of *Darley* v. *Langworthy* (1), which is a strong authority to shew that the absolute enjoyment of the real estate is not an essential element of the title to the chattels in such a case as this. The argument is completely met by the construction of the will which I have adopted on the authority of what is laid down by Lord *Cairns* in the case of *Martineau* v. *Briggs* (2). It seems to me, therefore, that the case of the Petitioner, as regards the chattels, fails.

Next, I have to consider the bequest of the £20,000, which was given upon trust for the "person or persons for the time being entitled to my estate called *Harewood Lodge*" simply. There are no such words there as occur in the previous gift, viz., "under the devise thereof hereinbefore contained." But does that really make any difference? I think not. It could not have been the intention of the testator simply to attach the £20,000 to the *Harewood Lodge* so as to pass to anybody who might be entitled anyhow, for instance, as a purchaser. There must be some limitation to pass that. When I look at the words which follow, I think there cannot be any doubt that the testator meant really the person entitled to *Harewood Lodge* under the limitations in the previous part. He went on to say: "or as near thereto as the different nature of real and personal estate will admit, and so as the income thereof only be paid to the tenant

(1) 3 Bro. P. C. 359. (2) 23 W. R. 890.

C. A.
1889
In re TOWRY'S SETTLED ESTATE.
DALLAS v. TOWRY
Stirling, J.

for life of such estate, and so that no person or persons becoming entitled to my said estate of *Harewood Lodge* as tenant in tail by purchase shall be entitled to an absolute interest in the *corpus* of the said stocks, funds and securities unless or until he, she or they shall attain the age of twenty-one years, or die under that age leaving issue." So that the testator contemplated a series of limitations of *Harewood Lodge* under which there were to be a tenant for life, and persons becoming entitled as tenants in tail. That is completely answered by the limitations to Mr. and Mrs. *Hopkins* for life, and their sons in succession, as contained in the previous part of the will. I think no substantial difference can be made between the gift of the £20,000 and the gift of the chattels, and that the persons to take the benefit of each are designated by reference to the limitations previously contained in respect to *Harewood Lodge.*

How does the codicil affect the gift? It says "£20,000 to trustees, the same." I have a very strong suspicion that that was not the real intention of the testator, and that if he had really known what he was doing he would have expressed himself in a different manner; but I refer to the language of Vice-Chancellor *Wickens* in *Langdale* v. *Briggs* (1); he said (2): "If I were at liberty to conjecture, I should at once accept the construction of Lady *Langdale's* devisees" (who were the petitioners), "but, having to construe only, I must reject it." It seems to me that the words in the second codicil simply continue the gift by the will. I think, therefore, that upon the whole the case of the Petitioner fails.

T. F. M.

C. A.

From this judgment the Petitioner appealed. The appeal came on for hearing on the 1st of March, 1889.

Fischer, Q.C., Sir *Horace Davey*, Q.C., and *Cordery*, for the Appellant:—

The question arises as to two subjects, the £20,000 and the chattels. The gift of the chattels is upon trust to permit them to be enjoyed as heirlooms by the person or persons for the time

(1) 21 W. R. 620. (2) 21 W. R. 621.

being entitled to *Harewood Lodge* "under the devise thereof hereinbefore contained." The gift of the £20,000 does not contain a similar reference to the foregoing devise. Mr. Justice *Stirling* is not consistent as to the effect of those words. He relies upon them as regards the chattels, and then in the gift of the £20,000 he treats them as of no consequence, and comes to the same conclusion without them. We say that they are in fact superfluous words and ought to be rejected. The will and codicil are to be read together. Lord *Cairns* in *Martineau* v. *Briggs* (1), says: "A codicil always has to be added to a will. It is always to be taken as part of a will. The operation it may have on the will is to be ascertained by reading the words of the codicil in connection with what may be the wording of the will." By the codicil in the present case the testator inserts a limitation in favour of the Appellant, and in substance directs that the will shall be read as if this limitation had been inserted in it. In *Martineau* v. *Briggs* (2) it was held that a codicil altering the limitations of the will as to the freehold estates and not mentioning copyholds or leaseholds did not affect the latter, but in that case there was no intention shewn by the will that the freeholds, copyholds and leaseholds should go together beyond the fact that the copyholds and leaseholds were settled upon trusts corresponding with the limitations of the freeholds. The intention there was sought to be made out from extrinsic circumstances—that the drive up to the mansion was partly on freehold and partly on leasehold, that a lake near the mansion was partly on copyhold ground, partly on freehold, and other circumstances which made it impossible to suppose that the testator did not intend the three kinds of property to go the same way. If an estate is devised to certain uses and then another estate is separately devised to the same uses it is logical to hold that a codicil mentioning only the first estate does not affect the second. But where only one estate is settled, and it is expressly directed that chattels shall be enjoyed by the persons for the time being entitled to it, there is on the face of the will an indication of intention that the chattels and the estate shall go together. It is not a case where the Court is asked to infer such an intention from

(1) 23 W. R. 890. (2) 23 W. R. 889.

C. A.
1889
In re TOWRY'S SETTLED ESTATE
DALLAS v. TOWRY.

extraneous circumstances, and the Court will not allow the clearly expressed intention to be defeated merely because of such an expression as "under the devise hereinbefore contained": *Lord Carrington* v. *Payne* (1); *In re Gibson's Trusts* (2); *Evans* v. *Evans* (3).

With regard to the costs in the Court below, they ought to be borne by the residue: *In re Haseldine* (4).

Methold, for *F. T. A. Law*, the first devisee in the will in default of issue of Mr. and Mrs. *Hopkins*:—

There is no revocation in the codicil of the gift of the chattels or of the legacy of the £20,000, and there is no governing intention to connect them with the real estate into whatever hands it may pass. The testator shews in his codicil an intention to alter nothing except the devolution of the real estate. The persons to whom the chattels and codicil are given by the will are *personæ designatæ*, and in the case of the legacy of £20,000, the codicil expressly states that it is to be "the same," that is, for the same persons as in the will. The case is governed by *Martineau* v. *Briggs* (5). We also rely on *Darley* v. *Langworthy* (6); *Bridges* v. *Strachan* (7); *Francis* v. *Collier* (8); *Hogg* v. *Jones* (9). The case of *Evans* v. *Evans* has been practically overruled. If the contention of the Appellant is correct, any person to whom the testator had sold the devised estate would take the legacy of the £20,000, which would be an absurd result.

Haldane, for *H. S. Law*, followed the same line of argument He referred to *Doe* v. *Hicks* (10); *Sugden's* Law of Property (11); *Jarman* on Wills (12).

Buckley, Q.C., and *Morshead*, for the personal representative of *H. G. Hopkins*, one of the residuary legatees:—

According to our view neither the Appellant nor either of the

(1) 5 Ves. 404.
(2) 2 J. & H. 656.
(3) 17 Sim. 86.
(4) 31 Ch. D. 511.
(5) 23 W. R. 889.
(6) 3 Bro. P. C. 359.
(7) 8 Ch. D. 558.
(8) 4 Russ. 331.
(9) 32 Beav. 45.
(10) 8 Bing. 475.
(11) Page 214.
(12) 4th Ed. vol. i. p. 180.

Respondents, *F. T. A. Law* and *H. S. Law*, is entitled to the chattels and legacy. The will gives the chattels to the "persons for the time being entitled to *Harewood Lodge* under the devise hereinbefore contained." The Appellant does not come under that description. He is not entitled under the devise contained in the will. The same reasoning applies to the gift of £20,000, which is directed by the codicil to go in the same way as in the will. On the other hand the Respondents, *F. T. A. Law* and *H. S. Law* cannot take either the chattels or legacy because there is no gift to them in the codicil and no revocation of the original gift. That is well settled by authority. Therefore they are undisposed of and must fall into the residue: *In re Gibson's Trusts* (1).

With respect to the costs in the Court below, we contend that they ought not to be borne by the residue but ought to be paid out of the proceeds of the sale of the chattels, and out of the legacy: *Attorney-General* v. *Lawes* (2); *Martineau* v. *Rogers* (3); *Jenour* v. *Jenour* (4); *Richardson* v. *Rusbridger* (5).

Pownall, for other parties.

COTTON, L.J.:—

This is an appeal from the decision of Mr. Justice *Stirling* on a summons taken out to decide who is entitled to certain heirlooms and the produce of some heirlooms which have been sold, and also to the sum of £20,000, both being given by the will and codicil of the testator, *George Edward Towry*.

The case was argued very much by Mr. *Fischer* and Sir *Horace Davey*, and to a certain extent by the Respondents, as if it turned on what was the real principle deducible from the two cases of *Lord Carrington* v. *Payne* (6) and *Martineau* v. *Briggs* (7). The case most relied upon by the Respondents was *Martineau* v. *Briggs* in the House of Lords, and what was said by the Lord Chancellor, Lord *Cairns*, in stating his opinion. Now in that case the point which arose was, whether the gift of a freehold estate, and the

(1) 2 J. & H. 656.
(2) 8 Hare, 32.
(3) 8 D. M. & G. 328.
(4) 10 Ves. 562.
(5) 20 Beav. 136.
(6) 5 Ves. 404.
(7) 23 W. R. 889.

C. A.
1889
In re TOWRY'S SETTLED ESTATE.
DALLAS *v.* TOWRY.
Cotton, L.J.

gift of leasehold and copyhold estates, both of which gifts were contained in the will, were severed in consequence of what was done by the codicil. In the will there was a gift in terms of the freehold estate to persons named, with certain devolutions and ordinary limitations; then there was a gift, first, of the copyhold saying it was to be held on the same uses as were declared concerning the freehold estate, so far as the different nature of the property would allow, and there was a similar gift as regards the leasehold estate. Now what did the codicil do? It dealt specifically with the freehold estate and altered, and to a certain extent, therefore, revoked, the limitations of the freehold estate contained in the will without mentioning the copyholds or leaseholds. The question was, whether that could revoke and alter the limitation as to the copyholds and leaseholds, and the House of Lords—as Vice-Chancellor *Wickens* had done before—said, "No, the gift in the codicil must be considered as a gift revoking only those limitations which are contained in the will with respect to the freeholds, and the gift in the will must be considered as regards the copyholds and leaseholds as if they were by reference a gift to the same persons as were to take under the limitations in the will as to the freehold estate." As the codicil specially referred to the limitations of the freehold contained in the will, and did not refer to the limitations of the copyhold and leasehold it was held to revoke the one and leave the other untouched, because on that will the gift of the copyholds and of the leaseholds must be taken to be gifts having the same effect as if in each gift there was a repetition of the names of the persons to whom the freehold estate had been given. There was nothing, as Lord *Cairns* thought, to shew that in this testamentary disposition there was any express intention on the face of the will or codicil to unite the two classes of property. Although of course if the limitations of the will had stood as they were, the gifts would have been united, yet that was only because there was a gift in the will to the same persons. But when the codicil revoked the gift of freehold in the will to one person, and did not alter or refer to the gifts in the will of the copyhold or the leasehold, there was a severance. There was a severance, because there was a gift by one instrument to *A. B.*, and a gift by the

other to *C. D.* The decision turned on this ground, in my opinion, that there was nothing expressed on the will to shew that the testator intended the two estates to be united. If there had been, we will not guess as to what the decision of the House of Lords on that will might have been. If there are any expressions contained in the will or codicil shewing an intention that there shall be a union of the estates then the Court must act on that as far as it can, but if there is no intention expressed on the face of the will we are not justified, because a certain set of limitations united the two, in inferring that the testator intended that union still to continue. *Lord Carrington* v. *Payne* (1) is a good example of the contrary construction. In that case there were limitations of certain real estates, and then there was, not another set of estates, but personal estate which was directed by the will to be laid out in land to be settled to "such uses, upon such trusts, and in such and the like manner as hereinbefore directed respecting my real estates directed to be comprised in the said term of ninety-nine years," &c. There was not, so far as I can see, anything like such an expression of intention to unite as there is here; but Lord *Alvanley* held that there was an intention to unite. In the will there was a direction to put in settlement both the estates which the testator had, and the estates which were to be purchased; and in the codicil he left directions which shewed that a settlement was to be executed, and from that Lord *Alvanley* came to the conclusion that there was on the face of the will a sufficient expression of intention that the estates should be united, and go to the same person. In the codicil the testator did not say anything about the purchased estates, but he did not revoke or alter those limitations from which Lord *Alvanley* concluded he intended a union, and Lord *Alvanley* held that, as he did not revoke or alter the intention to unite, he intended to keep the estate united by directing the trustees to make one settlement of both sets of estates. That case was referred to by Lord *Hatherley* in *In re Gibson's Trusts* (2), and he points out what was the ground of the decision, namely, that if one can see an intention to unite two sets of estates, one only of which is referred to in the limitations

(1) 5 Ves. 404. (2) 2 J. & H. 656.

C. A.
1889
In re TOWRY'S SETTLED ESTATE
DALLAS *v.* TOWRY.
Cotton, L. J.

contained in the will, and altered by the codicil—the intention to unite not being altered or revoked—one must carry that into effect so far as one can, though in terms the codicil only refers to one set of estates, and not to the other.

Now what have we here? As regards the heirlooms, what the testator does is this. By his will he gives various things to the trustees "in trust to permit the same to be held and enjoyed as heirlooms as far as the rules of law or equity will permit, by the person or persons for the time being entitled to my said messuage or tenement called *Harewood Lodge* under the devise thereof hereinbefore contained." That shews an intention to unite the possession of the estate of *Harewood Lodge* with the enjoyment of these chattels; but when we go on further and look at the leasing power it seems to my mind there is a very clear expression of intention to be found in it; because the leasing power is not only to apply to *Harewood Lodge*, but is also to include the furniture and other effects "hereinbefore bequeathed as heirlooms, and to go therewith," that is to say, he repeats what is obvious from the first gift which I have read, that his intention in that gift was that the heirlooms should go with *Harewood Lodge*, and should be enjoyed by the person who is entitled to the possession of that estate.

Then we come to the codicil. In that codicil there was no intention expressed at all in any way to sever the chattels from the estate. All that is done by the codicil as regards *Harewood Lodge* is this. He leaves the gift to *Henry George Hopkins*, and *Sarah* his wife, and his children, untouched, as was decided by Vice-Chancellor *Stuart*—a decision which was not appealed from—then the testator introduces the present Appellant, putting him into a series of limitations before those who under the will would take next after the failure of issue of *George Hopkins* and *Sarah Hopkins*. Although he does not refer to these chattels in any way, yet, in my opinion, having regard to the clear intention which is expressed by the will, and is not revoked by the codicil, to keep these chattels with *Harewood Lodge*, we ought not to be influenced by the words "hereinbefore contained," which do in terms point to the persons who are to take under the limitations of the will, but ought to hold that the chattels are to be held

by the persons who under his testamentary disposition, even although altered by the codicil, would take *Harewood Lodge.* The codicil is part of the will in one sense. Where we have specific words, and there is nothing to lead us to give them a more general meaning, or lead us to prefer either the will or the codicil, we must follow the codicil and act on the terms in which the testator has chosen to express his testamentary disposition. In my opinion the Appellant is right as regards the heirlooms, and of course the proceeds of the heirlooms which have been sold.

Then we come to another point. A sum of £20,000 is settled by him, and it is to be held on trust for the person or persons for the time being entitled to his said estate called *Harewood Lodge.* There we have very much less difficulty. There is not the necessity of considering and determining whether "hereinbefore" is to be considered as controlling the express intention of the testator as regards the union of the pecuniary legacy and *Harewood Lodge.* But there are those words "for the person for the time being entitled to my said estate called *Harewood Lodge.*" The Appellant is under the testamentary disposition of this testator entitled to *Harewood Lodge.* Why is he not to take this legacy? It is said, if you hold he is to take it—and that seemed to impress Mr. Justice *Stirling*—you must hold that if the testator had sold *Harewood Lodge,* then the purchaser of *Harewood Lodge* would be entitled to this £20,000. No. What the testator is doing is giving the £20,000 to follow his testamentary disposition of *Harewood Lodge,* and if he had sold it there would come the question which has been argued by Mr. *Buckley,* whether the gift had entirely failed. But he has not sold it. We ought to hold that what was meant here is that the £20,000 is to go to any one who may under his testamentary disposition (I confine it to that) be entitled to *Harewood Lodge.* Mr. *Buckley* says the codicil (which is very inaccurate and very probably intended merely for instructions) is against that; because he says that the codicil which refers to the £20,000 says, "same as will," and that means that the £20,000 is not to be affected by the codicil. It is to be affected in this way; the codicil in my opinion, even having regard to the argument as to referential gifts, must be treated as

C. A.
1889
In re TOWRY'S SETTLED ESTATE.
DALLAS v. TOWRY
Cotton, L.J.

if repeating in terms the words inserted in the will with regard to the £20,000. If those words were repeated in the codicil who could for one moment doubt that the persons who took under the combined effect of the will and codicil are entitled to the £20,000? The terms in the will as regards the £20,000 do not create the difficulty which exists as regards the chattels, and in my opinion we ought to deal with the codicil as if the gift was introduced in terms again, and read it so as to include any one entitled, not only under the will, but under the codicil; that is to say, entitled under the testamentary disposition of the testator.

In my opinion the Appellant is right on both points. There is a gift of the £20,000 to the person entitled to *Harewood Lodge*, and as regards the chattels I have already said there is a good gift of the chattels to accompany *Harewood Lodge* in its present ownership. Therefore I need not deal with the ingenious argument of Mr. *Buckley* as to lapse on either of those points.

As regards the case of *Darley* v. *Langworthy* (1), which was quoted by Mr. *Methold* as against the Appellant, it does not bear on the present question, but it does bear on the argument of Mr. *Buckley*. In that case the testator had left to his widow two estates, the devise of one of which, *Battens*, was revoked by the act of the testator. The testator also left to her certain chattels so long as she chose to reside at *Battens*, and the House of Lords held that she could not lose by the act of the testator the right which otherwise she had to these chattels. I will consider the question of costs after the other Lords Justices have delivered their judgments.

LINDLEY, L.J.:—

We have to construe two documents in the will and codicil. The first thing we have to consider is what kind of instruments we are dealing with. They must be construed as forming so far as they can one testamentary disposition. Each is revocable. The second one has more or less varied the first. What we have to do is to find out from the language of the two documents what the testator's real intentions were and to give effect to them,

(1) 3 Bro. P. C. 359.

bearing in mind that he was at perfect liberty to change and alter what he had said in the will, and bearing in mind that if there is any discrepancy in the two instruments the latter must prevail. That is the task before us. In performing that task it does not appear to me that we derive much benefit from other cases, either in this particular instance, or generally. If we are to refer to cases, I think this is nearer *Lord Carrington* v. *Payne* (1) than *Martineau* v. *Briggs* (2). I would only say that *Martineau* v. *Briggs* is distinguishable on this ground, that the House of Lords had a different problem. If you looked at the documents the intention of the testator as declared by the documents was tolerably plain. When you looked outside and made yourself acquainted with the locality of the property which the documents referred to the inference was strong that the testator could not have meant what he said, and the House of Lords in that perplexity said, you must give effect to the language of the documents rather than to any inference of your own drawn from external facts and circumstances. That is really all which that case decided. That has no application in that point of view to the case which we have to decide.

Looking at the two documents with a view to ascertain what the real intention of the testator was, the first thing that strikes anybody is this, that it certainly was part of his intention in the will, declared by the use of the word "heirlooms," declared by the limitations, and emphatically by the power of leasing, that the heirlooms were to go with the freehold estates. You cannot find in the codicil any intention of altering that intention at all. There is nothing in the codicil which warrants the inference that the testator had changed his mind in that respect. What he had done was this. In consequence of the birth of a son he had altered the limitations of the will as regards the freehold estate. There is no difficulty in holding that the devisees of the real estate took the heirlooms except the expression in the will "under the devise hereinbefore contained." Where there is a choice of evils which is to prevail? Are you to give effect to the clear and manifest intention of the testator that the heirlooms are to go to the persons to whom he leaves them by his will and

(1) 5 Ves. 404. (2) 23 W. R. 889.

C. A.
1889
In re TOWRY'S SETTLED ESTATE.
DALLAS *v.* TOWRY.
Lindley, L.J.

codicil, by his testamentary disposition, or are you to sacrifice that intention to the words "hereinbefore contained"? It is a choice of evils. It appears to me more proper to give effect to the intention than to sacrifice the spirit to the letter. The Court ought not to sacrifice the clear intention to a more or less inapt expression—apt enough when the will was drawn, but inapt when the codicil altered it.

As regards the £20,000 there is no such difficulty. The £20,000 is referred to both in the will and in the codicil. In the will it says the £20,000 is to go to the persons entitled to the estate. There is no question as to "hereinbefore contained." In the codicil you have the same thing. The £20,000 is mentioned, and what the codicil tells you to do is this: "£20,000 the same as will." What does that mean? That it is to go to the persons who take the estate, not under the will as it stood, but under the testamentary disposition as altered by the codicil. That appears to me to be plainer than the other point.

Then it was said, if you construe the will and codicil in this way, if the testator sold the estate to a stranger you would have to give him the £20,000. Not at all. That would not only be absurd but it would be to sacrifice the intention, and not to give effect to it. What the man is dealing with is his own testamentary disposition. The person to whom he gives the estate by his testamentary disposition, by those documents, which when he dies will have to be construed together, takes it. I feel no difficulty about that point. I think the appeal must be allowed. We will consider the question of costs presently.

LOPES, L.J.:—

The ground on which I rest my decision in this case is this, that, according to my view, there is a clear and unmistakeably expressed primary intention in the will to unite the chattels and real property, and to unite the money and real property, and that the codicil makes no alteration with regard to its union. The testator would have his will in his mind when he made his codicil, and I am compelled to conclude that the same intention continued when he made that codicil as existed in his mind when he made the will, namely, the intention to keep the property united,

because there is nothing in the codicil revoking the intention to unite to which I have alluded. That being so, what was the intention of the testator is to be gathered from his will and his codicil read together, because that is the point on which the decision of the Court must proceed. I think the intention was that the property should remain united, and should devolve as mentioned in the will, except as far as varied by the codicil, that is, varied by introducing the son of *Charles Law*, the Appellant, between the children of Mr. and Mrs. *Hopkins* and *Francis Towry Adeane Law*, varied merely by the interposition of a new devisee born between the making of the will and the making of the codicil. To my mind it is just the same if the testator had with his own hand inserted in the will the name of the Appellant after the *Hopkins* family. This view disposes of the question of the lapse which was so ingeniously raised by Mr. *Buckley*.

This case, to my mind, comes within the principle of the decision of *Lord Carrington* v. *Payne* (1), and is distinguishable from the decision in *Martineau* v. *Briggs* (2). I think, therefore, the appeal should be allowed.

COTTON, L.J.:—

Now we come to the question of costs. I have looked at the Registrar's book for the 17th of November, and it appears there that Mr. *Method* and Mr. *Buckley* produced the same arguments practically as they have done here. They induced Mr. Justice *Stirling* to make an order which we think erroneous. There can be no doubt, therefore, that they must pay the costs of the appeal. What is to be done with the previous costs? The general rule is this, that the residue bears the costs of any action brought in order to determine the true construction of the will. I think there is this exception, that when a legacy is set apart from the estate, and the only question arises as to what is to be done with that legacy, then the legacy bears the costs, and the costs that will come out of the estate come out of that legacy. But here what the devisees under the will have done is this:— On the petition which related partly to the chattels, and a sum

(1) 5 Ves. 404. (2) 23 W. R. 889.

C. A.
1889
In re TOWRY'S SETTLED ESTATE. DALLAS *v.* TOWRY

which arose from the sale of the chattels, and the money from the sale of real estate to which the Petitioner was clearly entitled, they raise these questions, and these questions being raised an originating summons was taken out by the trustees. The trustees' costs must come out of the fund. These parties ought to pay the costs not only here, as I have decided they must do, but in the Court below, of the summons, though there will be no separate costs in the Court below of the petition.

LINDLEY and LOPES, L.JJ., concurred.

Solicitors: *Woodrooffe & Burgess; Tylee & Co.; Maples, Teesdale & Co.*

M. W.

C. A.
1889
March 7, 8, 15

ROBINSON *v.* KILVERT.

[1888 R. 5655.]

Nuisance—Landlord and Tenant—Implied Agreement for quiet Enjoyment—Derogation from Grant.

If a person carries on upon his property some process which is in itself noxious, a neighbour may be entitled to restrain him from carrying it on so as to cause damage to him; but if the process is not in itself noxious, it cannot be complained of as a nuisance unless it interferes with the ordinary enjoyment of life or the ordinary use of property.

A landlord who lets part of his property for the purpose of a particular trade, is not to be taken as having entered into an implied contract precluding him from a reasonable and ordinary use of the remainder, on the ground that such use injures a particular class of his tenant's goods, it not having been known to him at the letting and not being a matter of common knowledge that that particular class of goods was liable to be so injured, nor is such user by the landlord a breach of his covenant for quiet enjoyment.

A landlord let a floor to a tenant for a paper warehouse, retaining the cellar immediately below. He afterwards commenced in the cellar a manufacture which required the air to be hot and dry, and employed a heating apparatus. This raised the temperature on the floor of the tenant's room to about 80°, but the general air of the room was never nearly so high, and it did not appear that the workpeople were inconvenienced. The tenant sued to restrain the landlord from heating the cellar, on the ground that the heat dried his brown paper and made it less valuable, though it was not such a heat as would injure paper generally. The landlord did

not know at the time of the letting that the tenant was going to store any particular kind of paper which was liable to be deteriorated by a heat which would not hurt paper generally:—

Held, that the landlord was not liable either on the ground of nuisance or of implied agreement for quiet enjoyment.

Cooke v. *Forbes* (1) considered.

BY a short agreement in writing, dated the 28th of February, 1887, between the Defendants (the *Kilverts*) of the one part and the Plaintiff, *R. H. Robinson* (under his trade appellation of *Robinson & Co.*, "paper and twine merchants"), of the other part, the *Kilverts* agreed to let and *Robinson* to take the ground floor of a warehouse in *Manchester*, for seven years from Lady Day, 1887, at the rent of £70. The tenant agreed to keep the premises in good repair (outside walls, principal timbers, and reasonable wear and tear excepted), and to yield them up in such repair at the end of the tenancy, and agreed not to assign or underlet. The landlords agreed to keep the drains properly trapped and in good condition, and to allow the tenant to remove any fittings he might place in the premises, subject to their being removed before the expiration of the tenancy.

The Plaintiff, to the knowledge of the Defendants, took the premises as a warehouse for paper and twine. Before taking them he inspected the cellar below, to see whether the floor would be sufficiently strong to carry his heavy goods. He saw there a boiler, and, as he deposed, said to *G. Kilvert*, one of the lessors, that it would never do to use the boiler, as it would dry his paper, to which the reply was that it probably would never be used again except to light the lessors' warehouse with electricity; that the Plaintiff then said, "Then you will light me as well," to which the answer was, "Oh, yes." He saw that the cellar had no ceiling. *G. Kilvert* denied having said anything as to the probability that the boiler would not be used. About September, 1887, the lessors commenced business as paper-box makers, for which they required warm and dry air. For this purpose they used the boiler, and set up some steam piping in connection with it, the effect of which was that heat escaped into the Plaintiff's premises, and the more so as the boards of the floor did not fit

(1) Law Rep. 5 Eq. 166.

C. A.
1889
ROBINSON
v.
KILVERT.

closely. It appeared that sometimes the temperature in the Plaintiff's warehouse rose as high as 80° on the floor, but it did not appear from the evidence that the temperature of the general air of the room was often above 65°, and very frequently it was below 60°.

The Plaintiff's complaint was that this heat caused injury to his paper by making it too dry. It was not made out that any harm was done to any kind of paper except brown paper. As to this kind of paper the Plaintiff's case was that it was sold by weight; that if stored in air of a proper temperature and containing the ordinary amount of moisture it increased in weight during storing; that since the Defendants had increased the temperature it had lost in weight and also become brittle, and that he had suffered a sensible diminution of his profits in consequence. Both the Vice-Chancellor of the County Palatine and the Court of Appeal considered this case to be established.

The manager of an important firm of paper manufacturers deposed that any brown paper would improve up to 60°, and that some kinds of brown paper would take no harm even at 80°; that between 60° and 80° some kinds would become brittle, but not unsaleable; and that ordinary brown paper would be dried too much, but would not be made unsaleable, by a temperature of 80°.

The Plaintiff brought his action to restrain the Defendants from heating and drying the air in his warehouse so as to cause damage to him in his business. The action was tried by the Vice-Chancellor of the County Palatine, and was mainly argued before him on the question whether there was between the Plaintiff and Defendants any contract amounting to a warranty that the property was fit and proper for the purpose of enabling the Plaintiff to carry on therein the trade of paper and twine merchant. His Honour held that there was not; and that as the agreement was an agreement for a lease without any special terms of warranty, and without any implied warranty as to the fitness of the premises for the particular purpose for which the Plaintiff took them, what the Defendants were doing was not a derogation from their grant. His Honour accordingly dismissed the action.

The Plaintiff appealed, and the appeal was argued on the 7th and 8th of March, 1889.

Henn Collins, Q.C., and *Hopkinson*, for the Appellant:—

We do not contend that there was a warranty, but we say that there was an implied covenant for quiet enjoyment of the premises in the condition in which they were when we took them. They were then suitable for the purpose for which we took them, and the Defendants by their own act have rendered them unsuitable. That is a breach of the implied covenant: *Bandy* v. *Cartwright* (1); *Shaw* v. *Stenton* (2).

[LOPES, L.J.:—Has anything short of actual physical interference ever been held a violation of the covenant for quiet enjoyment?]

Sanderson v. *Mayor of Berwick-upon-Tweed* (3) comes very near it. It is impossible to draw a strict line between physical interference and other interference. Quiet enjoyment does not only refer to the possession; anything that interferes with the reasonable use of the property as contemplated at the time of the demise is a breach of the covenant.

But independently of any implied covenant, the acts of the Defendants were a derogation from their grant: *Siddons* v. *Short* (4); *Robinson* v. *Grave* (5). Although there is a conflict of evidence as to the exact heat kept up there is quite sufficient to shew that the Defendants have rendered it impossible for the Plaintiff to carry on his business there.

Crackanthorpe, Q.C., and *Maberly*, for the Defendants:—

The Plaintiff's case fails at all points. There is no evidence of any great heat; there is nothing that would, at common law, amount to a nuisance. There was no implied covenant or obligation to keep the premises in such a state that the Plaintiff could exercise a particular trade in them. There is no evidence that the Defendants had any notice that the Plaintiff wanted to use them to store paper, and it is proved, on the other hand, that the

(1) 8 Ex. 913.
(2) 2 H. & N. 858.
(3) 13 Q. B. D. 547.
(4) 2 C. P. D. 572.
(5) 21 W. R. 223.

C. A.
1889
ROBINSON
v.
KILVERT

Plaintiff saw the boiler and knew that the Defendants intended to use it. If it was necessary to his business that he should have moist air he ought not to have taken the premises. The Plaintiff says that a contract for quiet enjoyment for all the purposes of his business must be implied. But, to determine what contract can be implied, all the circumstances of the case at the time when the premises were taken must be looked to. The Plaintiff never disclosed to us that brown paper required moisture, and it is not a piece of common knowledge that it does. Paper is usually injured by damp, not by dryness, and no one not in the paper trade can be supposed to know that there is any kind of paper which would be hurt by such a temperature as what is now complained of. The Plaintiff knew of the furnace and encouraged us to work it for electric lighting. The case referred to of *Sanderson* v. *Mayor of Berwick-upon-Tweed* (1) was a case of structural interference; the present is a case of the first impression.

[LOPES, L.J., referred to *Dennett* v. *Atherton* (2).]

Howard v. *Maitland* (3) shews that a proceeding such as those of the Defendants is not a breach of a covenant for quiet enjoyment. There is no interference with the ordinary user of the Plaintiff's premises. Most people would be glad of the extra dryness and warmth produced by the Defendants' furnace. The Plaintiff actually misled us. He inspected the cellar and saw that there was no ceiling, only a boarded floor on open joists, yet he never asked for a ceiling, and he asked us to put up a fireplace in his warehouse, which we did. There is no interference with any ordinary lawful user by the Plaintiff of his room, and what we are doing is nothing but an ordinary lawful user of our cellar. The case is therefore wholly unlike *Ball* v. *Ray* (4), which turned upon the user complained of as a nuisance being unusual. An easement may be implied co-extensive with the known uses of a grant: *Robinson* v. *Grave* (5); but here the only known use was storing paper, and ordinary paper could be kept here without injury.

(1) 13 Q. B. D. 547.
(2) Law Rep. 7 Q. B. 316.
(3) 11 Q B. D. 695.
(4) Law Rep. 8 Ch. 467.
(5) 21 W. R. 223, 569.

[LOPES, L.J.:—Is a process to be held a nuisance because it interferes with a particular trade? *Cooke* v. *Forbes* (1) bears upon the point.]

That case intimates that, in case of clear injury being shewn, it would not always be a sufficient defence to say that the complainant's manufacture was exceptionally delicate; but it does not establish such a general proposition as that given in the head-note. If the Defendants were carrying on some unusual business the Plaintiff might have a case, but we are only carrying on an ordinary business which is not more likely t injure our neighbours than almost any other trade.

Henn Collins, in reply:—

The Vice-Chancellor thought that the doctrine as to a man's derogating from his own grant did not apply, and he set up a wrong standard as to what amounted to a nuisance.

[COTTON, L.J.:—Is injury to a very delicate trade a nuisance if it would not injure an ordinary one?]

Yes, if the delicate trade is a reasonable user of the property: *Cooke* v. *Forbes*.

1889. Mar. 15. COTTON, L.J.:—

This is an appeal by the Plaintiff from a judgment of the Vice-Chancellor of the County Palatine who has dismissed his action. The Plaintiff occupies, as tenant to the Defendants, the ground floor of a warehouse in *Manchester*. After the lease had been granted the Defendants, who retained in their occupation the cellar below the room demised to the Plaintiff, commenced carrying on the manufacture of paper boxes, which required heat and dry air. They accordingly put up pipes to heat their cellar. The heat went up to the floor of the Plaintiff's room, and to some extent prejudicially affected his business, which was that of a dealer in twine and paper. The evidence appears to establish that the heat injures the Plaintiff's stock of brown paper by drying it and preventing it from acquiring weight. The Vice-Chancellor considered it to be made out that the Plaintiff had

(1) Law Rep. 5 Eq. 166.

C. A.
1889
ROBINSON
v.
KILVERT.
Cotton, L J.

sustained an appreciable loss, but held that the Defendants were not liable.

The case was mainly put before the Vice-Chancellor on the ground that the Defendants had given an implied warranty that the premises were proper for the purpose of a twine and paper warehouse, and that anything done by the Defendants which made them unfit for it was a derogation from their grant. The Vice-Chancellor in my opinion rightly held that there was no such implied warranty. Before us the case has been rested on other and more tenable grounds. It was first argued as a case of nuisance. Now the heat is not excessive, it does not rise above 80° at the floor, and in the room itself it is not nearly so great. If a person does what in itself is noxious, or which interferes with the ordinary use and enjoyment of a neighbour's property, it is a nuisance. But no case has been cited where the doing something not in itself noxious has been held a nuisance, unless it interferes with the ordinary enjoyment of life, or the ordinary use of property for the purposes of residence or business. It would, in my opinion, be wrong to say that the doing something not in itself noxious is a nuisance because it does harm to some particular trade in the adjoining property, although it would not prejudicially affect any ordinary trade carried on there, and does not interfere with the ordinary enjoyment of life. Here it is shewn that ordinary paper would not be damaged by what the Defendants are doing, but only a particular kind of paper, and it is not shewn that there is heat such as to incommode the workpeople on the Plaintiff's premises. I am of opinion, therefore, that the Plaintiff is not entitled to relief on the ground that what the Defendants are doing is a nuisance.

Then it was contended that there was an implied contract between the landlords and the tenant, of which the Defendants' proceedings are a breach. The alleged contract is that the Defendants would not do anything to interfere with the Plaintiff's trade. Now to determine into what implied contract the Defendants can be considered to have entered, we must consider what was known to them when they let the property. They undoubtedly knew that the Plaintiff took it for the purposes of his business as a twine and paper merchant, but it is not shewn

that they knew anything as to his dealing in any particular class of paper. A case was alleged as to injury to tissue paper, but the evidence failed to establish it, there was no evidence that the heat had injured it, and there was sufficient evidence to shew that the heat in this room would not injure ordinary kinds of paper. The Defendants are not paper merchants, and cannot be assumed to have known, as it is not a matter of common knowledge, that such a degree of heat would injure this kind of paper, and it would in my opinion be wrong to imply a contract on their part not to do anything which would raise the temperature to this extent. The Plaintiff saw the boiler in the cellar, and if he wished to have a temperature not rising above the natural temperature of the air he ought to have bargained for a stipulation in his lease that nothing should be done in the cellar which would raise the temperature on his floor. He asked to have a stove put into his room, which would give the Defendants to understand that it was not necessary for him to have the air in its natural state. In my opinion, therefore, there is no such implied contract as the Plaintiff contends, and he is not entitled to complain of what the Defendants are doing. He must try whether he cannot stop the hot air from coming in through the chinks in the floor.

LINDLEY, L.J.:—

I have come to the same conclusion as the Vice-Chancellor though I do not quite agree with him as to the way of arriving at it. He founded his judgment mainly on the absence of any implied covenant that the property was fit for the purpose for which it was taken, the Plaintiff having at first rested his case on the implication of such a covenant. Before us the Plaintiff has put his case better; viz., first, on the ground that what the Defendants are doing amounts to nuisance; secondly, on the ground that what the Defendants are doing is a breach of an implied covenant for quiet enjoyment, the premises being, as he alleges, fit for the purpose for which they were let, and being made unfit for it by the act of the lessors; and, thirdly, which really comes to the same thing, that the lessors are by their acts derogating from their own grant.

C. A.
1889
ROBINSON
v.
KILVERT.
Lindley, L J.

As regards the question of nuisance, the lessors heat the air of their cellar so as to raise the temperature of the Plaintiff's room. There is no evidence to shew that the heat is such as to interfere with the comfort of the Plaintiff's workpeople, but there is evidence to shew that it damages one sort of paper sold by the Plaintiff, and so to some extent interferes with his use of the demised property. The Plaintiff contends that this establishes a case of nuisance, and he relies upon *Cooke* v. *Forbes* (1), in the head-note to which it is laid down that "It is no answer to a complaint by a manufacturer of a nuisance to his trade, to say that the injury is felt only by reason of the delicate nature of the manufacture." But that head-note goes too far, further than is warranted by the case. The defendants there were pouring into the air sulphuretted hydrogen, a gas of an offensive and noxious character. Now, if a man pours gas of that description into the atmosphere he does it at his own risk, and it may well be that he is liable for any damage done by it to a neighbour, although such damage would not accrue if the neighbour's manufacture were not of a delicate description. But there is a very broad difference between poisoning the atmosphere with sulphuretted hydrogen and doing something not in itself noxious, and which makes the neighbouring property no worse for any of the ordinary purposes of trade.

Then as to the breach of an implied agreement for quiet enjoyment. We have here an agreement for a lease with nothing in it to shew that goods requiring any particular protection were to be kept on the premises. *Bandy* v. *Cartwright* (2) shews that under a demise by parol there is an implied covenant for quiet enjoyment. The lessors here are not at liberty to do anything which will make the property unfit for the purpose for which it is let. The extent of the operation of a covenant for quiet enjoyment has been enlarged by the later authorities. In *Sanderson* v. *Mayor of Berwick-upon-Tweed* (3) Lord Justice *Fry*, in delivering the judgment of the Court of Appeal, says: "In coming to this conclusion we have not lost sight of the observations on the nature of such a covenant which were made by *Willes*, J., in *Dennett* v.

(1) Law Rep. 5 Eq. 166. (2) 8 Ex. 913.
(3) 13 Q. B. D. 547, 551.

Atherton (1). But it appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and, where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of the land may be otherwise affected." This doctrine is in advance of the older authorities, but I accept it, and if the effect of what the Defendants are doing had been to make the Plaintiff's room unfit for storing paper I should have been prepared to hold that there was a breach. But the evidence falls short of that—it does not shew that the room is made unfit for a paper warehouse—but only that it is made unfit for storing a particular kind of paper. Now if a tenant wants extraordinary protection for a particular branch of trade he must bargain for it in his lease. I am of opinion, therefore, that the Vice-Chancellor came to a correct result.

LOPES, L.J.:—

I am of the same opinion. I think the Plaintiff cannot complain of what is being done as a nuisance. A man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbour doing something lawful on his property, if it is something which would not injure anything but an exceptionally delicate trade. *Cooke* v. *Forbes* (2) has been disposed of by Lord Justice *Lindley*. In the present case the Defendants are not shewn to have done anything which would injure an ordinary trade, and cannot, in my opinion, be held liable on the ground of nuisance. Then as to the contention that the Defendants have broken an implied agreement not to do anything which will make the property unfit for the purpose for which it was let, we must look to what the Defendants at the time of letting knew as to the purpose for which the demised property was to be used. They knew that it was to be used for a paper warehouse, but they did not know that it was to be used for the storage of a kind of paper which would be damaged if the temperature were raised beyond the natural temperature of the

(1) Law Rep. 7 Q. B. 316, 326, 327. (2) Law Rep. 5 Eq. 166.

C. A.
1889
ROBINSON
v.
KILVERT.

air. If the goods to be stored wanted that special protection the Plaintiff should have bargained for it. I agree, therefore, that the appeal must be dismissed.

Solicitors: *W. A. Holcombe*, agent for *Theo. E. Jones, Manchester; Chester & Co.*, agents for *Crofton & Craven, Manchester.*

H. C. J.

C. A.
1889
March 20.

ARNISON *v.* SMITH.

[1887 A. 1361.]

Practice—Leave to adduce fresh Evidence on Appeal—Rules of Supreme Court, 1883, *Order* LVIII., *r.* 4.

Fifty-two persons who had severally taken debenture stock in a company sued the directors to recover damages on the ground that the stock was worthless, and that they had been respectively induced to take it by a prospectus containing gross misrepresentations. Forty of them appeared at the trial and gave evidence, the other twelve were not present, and no evidence was given on their behalf. An adjournment was asked for, but refused, there being no evidence to shew why they were not present. Judgment was given for the forty with costs, but the twelve were ordered to pay the costs occasioned to the Defendants by their being joined as co-Plaintiffs. The twelve appealed, and nine of them now applied that they might be allowed to attend and give evidence at the hearing of the appeal; on the ground that at the time of the trial six of them had been too ill to attend, another had been abroad, another travelling so as not to receive notice of the trial, and another had been called away to nurse a sick friend:—

Held, that no special circumstances were shown sufficient to induce the Court to make the order, for that the Plaintiffs' solicitor ought to have kept up communication with his clients so as to be able to bring them forward at the trial, or produce such evidence of their inability to attend as would have enabled him obtain an adjournment.

Whether Order LVIII., rule 4, is applicable where the party asking for leave to adduce evidence before the Court of Appeal has adduced no evidence at all in the Court below, *quære.*

THIS was an action by fifty-four persons who had severally taken debenture stock in the *City of Genoa Waterworks Company* against the directors, to recover damages on the ground that the Plaintiffs respectively had been induced to take the stock by a prospectus containing a gross misrepresentation as to the

amount of shares that had been subscribed for, and that the stock had proved worthless.

The action was tried by Mr. Justice *Kekewich*. His Lordship considered that there was a gross and culpable misrepresentation in the prospectus, such as to entitle to damages any one who had taken stock on the faith of it, and that a notice subsequently given to the persons who had taken debenture stock was not a sufficient defence. Two of the Plaintiffs died before the trial, and there had been no revivor. All the other Plaintiffs, except twelve, were examined on their own behalf at the trial, and proved that they received the prospectus and took their stock on the faith of it. The other twelve did not appear, and no evidence was given on their behalf, so there was nothing to shew that they had received the prospectus and been misled by it.

Mr. Justice *Kekewich* gave judgment that the forty Plaintiffs who had proved their cases should recover against the Defendants the damages which should be ascertained by the inquiry thereinafter directed in respect of deceit and misrepresentation in the prospectus, and their costs of the action. An inquiry as to damages sustained by the forty Plaintiffs was directed, and it was ordered that the Defendants should recover against the twelve remaining Plaintiffs their costs occasioned by the last-mentioned Plaintiffs being joined as Plaintiffs.

The Defendants gave notice of appeal from this judgment, and the above twelve Plaintiffs also gave notice of appeal from that part of the judgment which was adverse to them.

Nine of the twelve Plaintiffs now moved that they might if necessary, and without prejudice to any other grounds of appeal, be at liberty on the hearing of their appeal to give evidence *vivâ voce* on their own behalf, on the ground that they were unable. through illness and other unavoidable cause, to attend and be present and give evidence on their own behalf at the trial.

From the evidence given in support of the application it apeeared that six of the Plaintiffs were too unwell at the time of the trial to be able to attend, another was in *South America*, another was travelling about for his health and did not receive information as to the trial in time, and another was attending a friend who was dangerously ill, and could not safely leave her.

C. A.
1889
ARNISON
v
SMITH

The solicitor of the Plaintiffs deposed that he had never acted for any of the Plaintiffs in any other matter; that shortly before the trial he communicated with all the Plaintiffs and told them to hold themselves in readiness for the trial; that during the trial he received information of the illness of the six who were ill, but could not get evidence of the fact in time to support an application for adjournment; that he was not aware that another was abroad and another wandering about; and that the one who was attending the sick friend had been in Court, but had been called away for that purpose before she could be examined.

Counsel for the Plaintiffs had applied at the trial for an adjournment, that the absent Plaintiffs might attend, but the Defendants opposed, and as there was no evidence in support of the application it was refused.

Neville, Q.C., and *Oswald*, for the application:—

If the Court is against us on the present application we continue our appeal on the ground that, even if we are not entitled to judgment in our favour, the Judge below ought to have non-suited us instead of making a decree binding our rights, in which case we could bring a fresh action, but we now ask for leave to adduce evidence in order that at the hearing of the appeal we may secure an immediate judgment in our favour. The Court has jurisdiction to do what is asked under Order LVIII., rule 4, and the case is one where it is reasonable that the application should be granted. The illness of some of the Applicants, and the absence of the others, are, as we submit, sufficient special circumstances: *Dicks* v. *Brooks* (1); *Wilson* v. *Church* (2); *In re Chennell* (3); *Gover's Case* (4).

Farwell, for the Defendants:—

I submit that there are here no special circumstances within Order LVIII., rule 4. The solicitor was not in touch with the Plaintiffs because they were not his ordinary clients, and it is no special circumstance that he did not keep up communication with them so as to be able at the trial either to bring them up or

(1) 13 Ch. D. 652.
(2) 13 Ch. D. 1, 29.
(3) 8 Ch. D. 492.
(4) 24 W. R. 36.

to satisfy the Court that there was sufficient reason for their non-appearance, so as to obtain an adjournment. The Plaintiffs took the advantage of being grouped in this unusual way as co-Plaintiffs, and they must bear the burden. The Court will always be slow to let in fresh evidence on an appeal on the ground of the danger of perjury after the case has been tried, and the parties know exactly to what points to direct their evidence. In the cases referred to the evidence was merely formal and technical.

Neville, in reply, referred to *Ex parte Jacobson* (1).

BENGAL SECRETARIAT LIBRARY

COTTON, L.J.:—

This is an application by nine of the Plaintiffs for liberty to attend and be examined on the hearing of the appeal. The application is made under Order LVIII., rule 4, which so far as it bears on the present application is as follows: "The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court." The evidence, then, can only be admitted on special grounds. Mr. *Farwell* contends that there are in the present case no special grounds, and I do not think that there are. It is not as if the Applicants had given some evidence at the trial, and through a slip had not given all the evidence that was necessary. The Applicants gave no evidence at all, and so the application does not come within the spirit of the rule. It would be a dangerous precedent if we were to allow a party to bring forward for the first time before the Court of Appeal the

(1) 22 Ch. D. 312.

C. A.
1889
ARNISON
v.
SMITH.
Cotton, L.J.

whole of his evidence, without very strong special grounds. Here the only ground alleged is that the Applicants were some of them too unwell to attend and give evidence, and that the others were absent; but no reason is given why they did not instruct their solicitor to give such evidence as he could, or furnish him with such evidence as would enable him to apply for an adjournment. The form of action is unusual, fifty-four separate cases being joined, and each Plaintiff must be treated as if he sued alone. The present case shews one of the inconveniences of such a form of action. It may be that, when the appeal of the twelve Plaintiffs comes on, we may think it right to vary the judgment by expressing that it is to be without prejudice to any other action by them, but in my judgment we ought to refuse the present application.

LINDLEY, L.J.:—

This difficulty arises from trying the experiment of joining as co-Plaintiffs fifty-four persons each of whom has a distinct cause of action. There are some advantages in such a form of suit; it saves a great deal of expense, and enables a number of persons, who would not venture on suing alone, to obtain justice by acting collectively, but the case now before us shews that this form of suit has its inconveniences. The Plaintiffs' solicitor must have known that the cases of those Plaintiffs for whom no evidence was adduced would fail, and he ought to have been in communication with his clients so as to know whether they could attend, and, if they could not, then to be prepared with evidence to obtain an adjournment. His not having done so is not such a special circumstance as will induce the Court to give them leave to be examined on the appeal. I agree with Lord Justice *Cotton* that we ought to refuse the application, and leave it to be considered at the hearing of the appeal whether the judgment ought to be varied by making it without prejudice to fresh actions.

LOPES, L.J.:—

The Applicants adduced no evidence at all at the trial, and I doubt whether the case comes within Order LVIII., rule 4, but it is unnecessary to decide that, for if it does, I think the applica-

tion ought to be refused for want of sufficient special grounds. Mr. Justice *Kekewich* might have dismissed the action so far as regarded these Plaintiffs without prejudice to their bringing another, and we shall have to consider at the hearing of the appeal whether that would have been the right order to make.

Solicitor for Plaintiffs: *E. Kimber.*
Solicitors for Defendants: *Burn & Berridge.*

H. C. J.

CLAYTON *v.* LEECH.

C. A.
1889
March 22.

[1887 C. 4106.]

Lessor and Lessee—Mistake as to Lessor's Title—Compensation.

L., a leaseholder, believing that her term had thirty years to run, agreed in writing with *C.* to grant him a lease for twenty-one years, nothing being said about compensation for misdescription. *C.* did not investigate the title, but took an underlease for twenty-one years. In the following year he discovered that *L.'s* term had only about fourteen years to run, and he claimed compensation. *L.* offered to grant a fresh lease for the residue of the term less three days, but declined to give compensation. *C.* thereupon brought his action for rectification of the lease and compensation:—

Held (affirming the decision of *Kekewich*, J.), that as the compensation was claimed in respect of a defect of title which *C.* might have discovered before he took his lease, and there was no contract as to compensation, he was not entitled to compensation after taking it.

Besley v. *Besley* (1) approved, and held not to be overruled by *Palmer* v. *Johnson* (2), which turned on an express agreement for compensation.

BY letter dated the 19th of March, 1886, the Defendants offered to let to the Plaintiff on lease a house in *St. John's Wood*, on the *Portland* estate, at the yearly rent of £40, payable quarterly, on the usual quarter days, the tenant paying all rates, taxes, and out-goings except property tax on the rent. Term to commence on the 25th of March next. Lease to contain usual covenants with usual proviso for re-entry on non-payment of rent. The tenant to be at liberty to end the term at seven or fourteen years on the usual six months' notice. The Plaintiff signed an unconditional acceptance written on the same paper.

(1) 9 Ch. D. 103. (2) 13 Q. B. D. 351.

C. A
1889
CLAYTON
v.
LEECH

On the 19th of April, 1886, the lease was granted for twenty-one years from the 25th of March, 1886, determinable by the lessee at the end of seven or fourteen years. It contained the usual covenant for quiet enjoyment "without any lawful interruption, disturbance, or denial of, from, or by the lessors or any person or persons rightfully claiming from or under the lessors."

The Defendants, who held the property under a lease, made their offer in the belief that their term had thirty years to run. They in fact held under a lease for eighty-one years from the 11th of October, 1819, so that when they granted the underlease to the Plaintiff they had only a term of a little more than fourteen years. The Plaintiff did not call for production of their lease.

The Plaintiff, in March, 1887, expressed a wish to purchase the leasehold reversion, and the original lease was shewn to him. He declined to purchase, and in June, 1887, a letter was written to the Defendants on his behalf asking for compensation. The Defendants' solicitors wrote to the Plaintiff to say they would advise their clients to grant at their own expense a fresh lease for the residue of their term less three days. No reply was made to this letter.

On the 22nd of September, 1887, the Plaintiff's solicitors wrote to the Defendants' solicitors claiming compensation, and stating that the Plaintiff had contracted for the sale of his lease and the goodwill of his business, and that the purchaser had refused to complete, because the Defendants had only power to grant a lease for thirteen years.

This transaction with an intended purchaser was alleged to have taken place in December, 1886.

The Defendants' solicitors answered by refusing to give compensation, and on the 24th of October, 1887, the writ in this action was issued. By the statement of claim the Plaintiff claimed rectification of the lease and compensation.

On the 11th of July, 1888, Mr. Justice *Kekewich* dismissed the action with costs. The Plaintiff appealed.

Candy, Q.C., and *McConnell*, for the Appellant:—

We do not allege any fraud in this case, so an action of deceit

would not lie, and it is also clear that the covenants in the lease would not give us any remedy. We say, however, that we are entitled to compensation on the ground of misrepresentation. *Besley* v. *Besley* (1) is against us, but that case, which is on all fours with the present, was expressly disapproved of by the Court of Appeal in *Palmer* v. *Johnson* (2), and *In re Turner and Skelton* (3) is also against it. If the Plaintiff had not accepted the lease he would have had a right to specific performance with compensation: *Burrow* v. *Scammell* (4).

[COTTON, L.J.:—You must not assume that he would. I do not think it is established by that case.]

It must be a sufficient ground for compensation that a shorter term would not sell for as much as a longer. The overruling of *Besley* v. *Besley* by *Palmer* v. *Johnson* amounts to a decision of the Court of Appeal that in that case compensation ought to have been given. The Plaintiff was entitled to rely on the representation that the Defendants had a term long enough to enable them to grant the lease, for it was the duty of their solicitors to see that their clients had a reversion, as otherwise they could not distrain for rent: *Preece* v. *Corrie* (5); *Pascoe* v. *Pascoe* (6).

[COTTON, L.J.:—Here was a defect of title which you might have ascertained if you had called for the lessor's title.]

It could not be expected that we should do so. No tenant at a rack rent ever calls for the lessor's title.

Cock, Q.C., and *Daniel Jones*, for the Defendants, were not called upon.

COTTON, LJ.:—

This is an appeal from a decision of Mr. Justice *Kekewich*, who has dismissed an action brought by a lessee for compensation. The lessors, who were leaseholders, thought they had a longer term than they had, and under that erroneous impression granted

(1) 9 Ch. D. 103.
(2) 13 Q. B. D. 351.
(3) 13 Ch. D. 130.
(4) 19 Ch. D. 175.
(5) 5 Bing. 24.
(6) 3 Bing. N. C. 898.

C. A.
1889
CLAYTON
v.
LEFCH.
Cotton, L.J.

to the Plaintiff what purported to be a lease for twenty-one years. They had in fact only a term of which about fourteen years were unexpired. This was a defect of title which the Plaintiff could have discovered if he had called for inspection of the original lease. It may be that it is not usual for a person taking a lease at a rack rent to investigate the title, still the fact remains that the Plaintiff might at once have discovered this defect of title. On discovering the defect some time after he had taken his lease, he applied for compensation. Is he entitled to it? It is conceded that fraudulent intention cannot be alleged, and that there is no ground for an action on the covenants in the lease; but it is contended that the Plaintiff is entitled to compensation for misrepresentation. In *Besley* v. *Besley* (1) it was held by Vice-Chancellor *Malins*, in very similar circumstances, that there was no right to compensation. But it was urged that *Besley* v. *Besley* was disapproved of by the Court of Appeal in *Palmer* v. *Johnson* (2), and that the present case is governed by *In re Turner and Skelton* (3), which was there approved. But *Besley* v. *Besley* was quite a different case from *In re Turner and Skelton*. There was in the case of *In re Turner and Skelton* an express stipulation in the contract that if any error or misstatement should be found in the schedule it should not annul the sale, but compensation should be made in respect thereof. The vendors contended that this stipulation was put an end to by the conveyance. The Court there said that the defect was one of quantity which the purchaser discovered after conveyance, and which he could only have discovered previously by leave of the vendors, which they were not bound to give. The Master of the Rolls thought that it would be wrong to hold the contract for compensation to be put an end to by the conveyance, when the mistake was one which he could not by due diligence discover before conveyance, and he referred to the decision of Vice-Chancellor *Malins* in *Manson* v. *Thacker* (4) as being at variance with the prior authorities. In that case there was an express contract for compensation, and Vice-Chancellor *Malins* had refused to give compensation after conveyance. It was from this and not from the

(1) 9 Ch. D. 103.
(2) 13 Q. B. D. 351.
(3) 13 Ch. D. 130.
(4) 7 Ch. D. 620.

decision in *Besley* v. *Besley* (1) that the Master of the Rolls expressed his dissent. I do not consider that either *Besley* v. *Besley* or *Allen* v. *Richardson* (2) can be considered as overruled by *Palmer* v. *Johnson* (3), for that case went on an express contract for compensation which did not exist in the other cases. In my opinion, therefore, the authorities do not support the Plaintiff's case.

The case, then, is simply this, the Plaintiff after completion has discovered a defect of title, which, if he had chosen to investigate the title, he would have discovered before completion, and there was no contract to make compensation for defects. Under these circumstances I am of opinion that the Plaintiff has no right to compensation, and there is no authority which decides that he has. The appeal must therefore be dismissed.

LINDLEY, L.J.:—

There is no doubt here that the vendors made a mistake, and thus misled the Plaintiff, but unless he can shew that an action for damages will lie on the ground of that mistake he cannot succeed. The covenants in the lease give him no remedy. He brings his action for rectification of the lease and compensation. Rectification of the lease was offered him free of expense before action, but he was not satisfied with that. I think he has sustained some loss, but has he any legal remedy for it? *Besley* v. *Besley* is an express authority that he has not. He contends that the decision in that case has been overruled in *Palmer* v. *Johnson*, but in my opinion that is not so. *Besley* v. *Besley* is perfectly consistent with *Palmer* v. *Johnson*, which only decided that a contract for compensation was not put an end to by the conveyance I am therefore of opinion that the appeal fails.

BOWEN, L.J.:—

At law the Plaintiff could not recover damages, for there is no covenant express or implied which the Defendants have broken. The implied covenant which would have arisen from the demise is excluded by the express qualified covenant for quiet enjoyment. Then how does the case stand as a demand for compen-

(1) 9 Ch. D. 103. (2) 13 Ch. D. 524.
(3) 13 Q. B. D. 351.

C. A.
1889
CLAYTON
v.
LEECH
Bowen, L.J

sation for a defect of title? I believe it is not usual in taking leases in the metropolis at a rack rent to call for the lessor's title, but it does not follow that the Plaintiff could not as a matter of right have claimed to have the title shewn, and if he had taken that precaution he would have found out the mistake. He has chosen to complete without investigating the title, and cannot have any right to compensation unless there is some stipulation entitling him to claim it, and there is none.

Besley v. *Besley* (1) is directly opposed to the Plaintiff's claim. It was contended that that decision had been overruled by *Palmer* v. *Johnson* (2), but I am of opinion that it was not so overruled. The point decided in *Palmer* v. *Johnson* was, that an agreement to make compensation for a misdescription of the thing sold was not extinguished by taking a conveyance, unless the agreement was so expressed as to limit it to defects discovered before the conveyance. The language of all the judgments in *Palmer* v. *Johnson* appears to treat *Besley* v. *Besley* as wrong, but that is erroneous. All that was intended, as I think, was to decide that any expressions in *Besley* v. *Besley* which laid down a principle inconsistent with that laid down in *Palmer* v. *Johnson* were wrong. It had been cited as an authority for the proposition that, in the absence of fraud, no relief for misdescription could be given after conveyance; perhaps the language in it may have been too wide; and so far, if at all, as it supported that proposition, it was overruled. When, however, the fact is looked at, that in *Besley* v. *Besley* there was no agreement for compensation, the decision in that case is not inconsistent with *Palmer* v. *Johnson*, and in my opinion it was rightly decided.

Solicitors: *Graham & Chater; Allen & Edwards.*

(1) 9 Ch. D. 103. (2) 13 Q. B. D. 351.

H. C. J.

HOLLIDAY *v.* HEPPENSTALL BROTHERS.

[1887 H. 2326.]

C. A.
1889
STIRLING, J.
Feb. 23.
C. A.
March 27.

Practice — Letters Patent — Validity of Patent — Particulars of Objections — Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 29.

In an action for infringement of a patent the Defendants disputed the validity of the patent on the grounds of want of novelty and anticipation, and delivered particulars of objections, in which they referred to about twenty specifications, stating that in each case they relied on the whole specification, and to passages, some of them of considerable length, in above twenty books. The Plaintiff applied for better particulars. *Stirling*, J, ordered the Defendants to deliver better particulars as to the specifications, but made no order as to the extracts from books:—

Held, on appeal, that the Defendants must be ordered to strike out from their particulars all the publications on which they relied simply as proving the state of general public knowledge at the time when the patent was granted to have been such that there was no invention in the patented process; and that, as regarded alleged anticipations, they must state the nature of the anticipations on which they relied, and point out distinctly, though not necessarily by page and line, where such anticipations were to be found.

THIS was an action commenced in 1887 to restrain the infringement of two patents granted in 1874 and 1877 for improvements in dyeing aniline black.

The Defendants by their statement of defence denied, *inter alia*, that they had infringed either of the patents, and alleged, par. 5, that the Plaintiff's alleged inventions were not novel at the date of the respective letters patent for the reasons set forth in the particulars of objections; and, par. 6, that the letters patent were invalid for the reasons mentioned in the particulars of objections.

The particulars stated as reasons for the invalidity of the patent of 1874—

"2. That the alleged invention disclosed by the specification filed under the said letters patent was not of any utility, and did not make any useful addition to the stock of public knowledge existing at the date of the said letters patent."

"4. That the said alleged invention was not novel at the date

C. A.
1889
HOLLIDAY
v.
HEPPENSTALL
BROTHERS.

of the said letters patent by reason of the prior publication and prior user hereinafter set forth."

"5. That the alleged invention was, prior to the date of the said letters patent, published in the *United Kingdom* by the printing and publication of the several specifications, notices, and books hereinafter set forth. Unless where otherwise expressly stated, the whole of the specification referred to is relied upon."

There then followed a list of seventeen specifications to earlier letters patent, not stating in any case that less than the whole specification was relied on, and references to twenty-two other publications, including a specification to a French patent published in this country by being placed in the library of the Patent Office. In most instances a single page was mentioned as being the one relied upon, but the whole of the French specification was relied on, and there were cases in which the whole of passages containing sixteen, eleven, fifteen, twenty, and seven pages were stated to be relied on. The specifications were all of them short.

The objections then went on to state public user of the alleged invention by four firms therein mentioned at times prior to the patent, and went on to say, "The Defendants further say that for several years prior to the date of the letters patent sued on herein, it was common knowledge in the dyeing trade that aniline black (as well for dyeing as for printing on fabrics) was produced by the oxidation of a salt of aniline with or without the addition of metallic salts, and such method was commonly practised, the ordinary oxydizing agents used being chlorates and chromates. These materials were used in various proportions, and the dyeing was effected sometimes in one and sometimes in more baths according to the preference of the person using them. The alleged invention in respect of which the letters patent sued on were granted (so far as the same is practicable or useful, if it be so at all) is only an example of this, and possesses no advantage over the other methods in ordinary use, and is merely an example of them, and possessed at the date of the said letters patent no patentable novelty whatever."

The objections to the second patent were similar. The specifications of twenty-six patents were referred to, it being stated in

each case that the whole specification was relied on, and thirty passages in books, some of them of from five to twenty pages in length.

The Plaintiff took out a summons asking that the Defendants might be ordered to deliver further and better particulars of objections under par. 5 of the statement of defence, specifying by pages and lines the parts of the several specifications, notices, publications, and books on which they intended to rely.

The summons was adjourned into Court and was heard by Mr. Justice *Stirling* on the 23rd of February, 1889.

Aston, Q.C., and *Macrory*, for the summons.

Moulton, Q.C., and *R. W. Wallace*, for the Defendants.

STIRLING, J.:—

I think that the Defendants have not sufficiently given particulars of the objections on which they rely, and that some further particulars must be given. The object of delivery of particulars is that the issues may be ascertained, and that when the case comes on for trial neither party may be taken by surprise. The Plaintiff has two patents, both of which are attacked on the ground of want of novelty. As regards the first, the Defendants rely on seventeen, and as to the other, on thirty-four prior specifications, provisional or complete, it being stated in each case that the whole of the specification is relied on. It seems to me that this is doing what Mr. Justice *Denman*, in *Fowler* v. *Gaul* (1), designated as throwing at the plaintiff's head a bundle of specifications. The Defendants, of course, know what they intend to rely on, and they ought, I think, to point out more particularly than they have done, the way in which they intend to use this mass of specifications. It may be somewhat difficult for them to do, but if all these specifications are to be gone into it really will not be possible to try the case. I am not prepared to go the length of saying, as I was asked to do, that in every case the Defendants are bound to specify pages and lines, but I think that they have not been particular enough,

(1) 3 Rep. Pat. Cas. 247.

C. A.
1889
HOLLIDAY
v.
HEPPENSTALL
BROTHERS
Stirling, J

and I shall order them in general terms to deliver further and better particulars. I think that where there are in the specifications claims which the Defendants do not intend to adduce at the trial as anticipations of the Plaintiff's invention, they ought to state that those are not relied on, or in some other way limit themselves more than they have done. How they are to do it I do not say, but I think that this great mass of specifications ought not to be put in without in some way defining the particular purposes for which they are to be used. If the Defendants can do this by pointing out pages and lines they ought to do so, but if not, they ought in some way or other to indicate the nature of the objection founded on each specification.

The order made was "That the Defendants *Heppenstall Brothers* do on or before the 9th of March, 1889, deliver to the solicitors for the Applicant further and better particulars in writing of the specifications referred to in the objections under the 5th paragraph of the statement of defence on which the Defendants mean to rely at the trial of this action, specifying the parts of the several blue book specifications by the printing and publishing of which the respective inventions the subject of this action are alleged to have been prior to the dates of the several letters patent the subject of this action."

C. A.

The Defendants appealed from this decision, and the Plaintiff gave notice that he should contend that better and further particulars of the references to books should be given. The appeal was heard on the 27th of March, 1889.

Moulton, Q.C., and *R. W. Wallace*, for the Defendants:—

There is no occasion for further or better particulars. Where a patent is for a mechanical contrivance, the specification is usually long and complicated, and if it is relied on as an anticipation it is necessary to point out what part of it is so relied upon. But the case is quite different as to these short descriptions of chemical processes. We cannot do anything but rely on the whole specifications, as we want to shew the state of knowledge to have been such at the time of the Plaintiff's patent that his patented process was no invention.

Aston, Q.C., and *Macrory*, for the Plaintiff:—

These particulars are oppressive. As was said by Mr. Justice

Denman in *Fowler* v. *Gaul* (1), this is throwing a bundle of patents at the plaintiff's head. That case shews that the Defendants are bound to shew in respect of what particular things we are to be attacked on the ground of each specification. *London and Leicester Hosiery Company* v. *Higham* (2) is a case where the defendant was held bound to shew which portions of the specifications were relied on as anticipations, although in that case the specifications were short.

R. W. Wallace, in reply.

Aston, Q.C., and *Macrory*, for the cross-appeal:—

If the Court should hold that the Defendants are bound to shew on what parts of the specifications they rely, *à fortiori* they are bound to shew on what parts of the long extracts from books they rely.

Moulton, Q.C., and *R. W. Wallace*, for the Defendants:—

There are only six passages of more than one page referred to, so that the Plaintiff cannot be under any difficulty as to the extracts from books.

COTTON, L.J.:—

In this case there are two appeals. The first is an appeal by the Defendants against an order made by Mr. Justice *Stirling*, which required them in general terms to give further and better particulars of the objections on which they relied by reason of the specifications which are mentioned in their particulars as shewing anticipations of the Plaintiff's inventions. Mr. Justice *Stirling* did not say what was to be done in giving further and better particulars, but decided that the Defendants must give some better particulars in order that the Plaintiff should know on what they relied. The second is a cross-appeal by the Plaintiff, because Mr. Justice *Stirling* did not make any order for further particulars as regards the publications referred to by the Defendants. I do not quite understand why he did not give any directions as regards those publications.

(1) 3 Rep. Pat. Cas. 247. (2) *Lawson* on Patents, p. 330.

C. A.
1889
HOLLIDAY
v.
HEPPENSTALL
BROTHERS.
Cotton, L.J.

Now, are these particulars of objections reasonably framed? The Act says (1): "If the defendant disputes the validity of the patent, the particulars delivered by him must state on what grounds he disputes it, and if one of those grounds is want of novelty must state the time and place of the previous publication or user alleged by him." That, I think, is clear enough. Then sub-s. 4: "At the hearing no evidence shall, except by leave of the Court or a Judge, be admitted in proof of any alleged infringement or objection of which particulars are not so delivered." I have referred to that for the purpose of dealing with the point which was relied on by Mr. *Moulton*, that he required a considerable number of these specifications and publications for the purpose of enabling him to prove the state of public knowledge, at the time and before the time of the Plaintiff's patent, to have been such as to shew that there was no invention in the Plaintiff's processes. In my opinion it is not required by the Act of Parliament that if a defendant relies on general public knowledge as an objection to a patent, he should state all the books or publications which contain that knowledge, or which gave to the public the means of acquiring that knowledge. He must shew by ordinary evidence, with reference, if necessary, to books, what the state of general public knowledge at the time was. Of course, if he relies on any publications as anticipations, he must refer to them particularly as being anticipations, but he need not refer to all the books from which the state of general public knowledge is to be inferred. If that is to be done, how far are you to go back? Are you to go back to spelling-books? You must prove by witnesses in a general way, and if necessary by reference to well-known works, what was the state of general public knowledge at the time when the specification was filed.

But it is said here, the Plaintiff's first patent was in 1874, which is so long ago that it is impossible now to expect that evidence can be given by witnesses to shew what they knew before that time. In my opinion, that ground is utterly untenable, for the Defendants in their particulars allege user of the Plaintiffs' process by one firm from 1865 to 1870, by another from 1866 to 1868, by another from 1870 to 1872, and by another from 1871 to

(1) Sect. 29, sub-sect. 3.

1872. There must be persons who were employed in those works able to give evidence of what they knew and what they did, and I should think it would not be difficult—for chemists have not particularly short memories — to shew what was the state of knowledge from 1870 to 1874 as regards this matter. It is true that the defendant, in order to rely on public knowledge, must state in his objections that the general state of public knowledge was such that there was no invention, and if he does not do so he cannot rely on public knowledge; but he must prove that public knowledge in the proper way by evidence, and although the mere production of books might, if they contained anticipations, prove anticipation, the mere production of them would not shew the state of general public knowledge.

Then as regards anticipations. What is the object of this enactment? It is this, that the parties may come to the trial prepared to meet the case which is intended to be proved against them, and that there may be no applications and orders for fresh trials on the ground of the plaintiff being taken by surprise through his not knowing what the point was that was going to be brought against him by the defendant. Then if the defendant refers to a mass of documents as containing anticipations, without shewing in some way how he intends to rely on them, the plaintiff will be put to enormous expense in being prepared on all points to meet every anticipation which can be suggested as contained in any of those documents, and there will be a great increase of cost in the trial of these cases, and a great increase of the length of the time (already sufficiently long) which is occupied in the trial of patent actions.

Now what ought to be done? I think that we ought to require the Defendants to strike out from their particulars of objections those publications on which they rely simply as enabling them to prove general public knowledge at the time of the Plaintiff's specifications. I think we ought also to require them to state more particularly what they rely on as regards the alleged anticipations—what the alleged anticipation is, and where it is to be found. I do not think it would be right to bind them to state what are the particular pages of the documents on which they rely as regards the anticipations. That might throw an

C. A.
1889
HOLLIDAY
v.
HEPPENSTALL
BROTHERS.
Cotton, L.J.

unfair burden on them, and might possibly prevent their case being properly brought before the Court, if by some accident they omitted a page on which they intended to rely. If they state the nature of the anticipation on which they rely, state where they find it, and in the case of a specification shew on what part of the claim they rely, they will have done enough, unless there is something else in the specification or publication of such a nature that it still remains doubtful on what they mean to rely. I think that in the present instance we ought to make one order on both the appeal and cross-appeal, varying the order of Mr. Justice *Stirling* by ordering the Defendants to expunge all particulars which are relied on merely to prove the state of knowledge in and before the years 1874 and 1877, and directing them to give further and better particulars of the alleged anticipations on which they rely, and to specify where in particular each anticipation is to be found.

LINDLEY, L.J.:—

I am of the same opinion. As a general rule we should not depart from the order made by the Judge below on such a question as refusing or ordering further particulars, which is very much a matter of discretion, and it must be a very unusual case to induce this Court to vary an order of that kind. But this case is a very unusual case, and if the precedent which is set by the Defendants is to be supported, it appears to me that there will be an amount of oppression and unnecessary litigation in patent cases which would be shocking to contemplate. There is in the case a difficulty which does not lie entirely at the door of the Defendants. I do not say anything about this particular patent, because we have not attempted to go into the specifications, but it is common knowledge with everybody engaged in patent cases that patentees very frequently so frame their specifications as to make it difficult for the public to know exactly what it is they claim. They of course try to make their claim sufficiently narrow to enable them to uphold their patent, and at the same time they try to make it so wide as to catch all sorts of things which do not fairly come within their real invention, and there lies the root of the mischief. If specifications were framed clearly,

much of the difficulty in patent cases would disappear. But making all allowance for that, what is the object of particulars of objection? The object is simply to prevent surprise. It is to enable a plaintiff to come prepared to meet the objections which may be taken to his patent. A patent may be attacked on various grounds, and two only are material for the purpose of the present discussion. The first is this—that the principle of the patented process and the mode of carrying it out were perfectly well known and were matters of common knowledge at the time when the patent was granted, so that the process was really no invention of the patentee. When the Defendants have said that, they need not go on to give all the evidence they intend to adduce to prove it. They need not in the present case, in order to shew the state of knowledge at the time of the Plaintiff's patent, put down every chemical book in which dyeing by aniline has been discussed and explained. That is not the kind of particulars of objections required by the Act of Parliament.

There is another head of defence, which is a totally different one. The Defendants may say, "You are not the true and first inventor. Here are *A.*, *B.*, and *C.* who have anticipated you. It was not a matter of common knowledge, because only a few people knew of it; but it had been published by other persons." Then they are bound to specify the alleged anticipations in order that the Plaintiff may have an opportunity of dealing with them. What these Defendants have done is to confuse the two things together and produce a mass of objections which appear to me oppressive in the highest degree; and if I had been the Judge of first instance I should have struck them all out, and ordered the Defendants to give further particulars. Our order will direct the Defendants to expunge from their particulars all those things hich they rely upon simply as evidence of common knowledge. The insertion of them is oppressive, and they ought never to have been put in. Then they must say what they rely on as anticipations, and they must say so in a manner which their opponents can understand.

Solicitors for Plaintiff: *Routh, Stacey, & Castle.*

Solicitors for Defendants: *Burn & Berridge*, agents for *Ramsden, Sykes, & Ramsden, Huddersfield.*

H. C. J.

C. A.
1889
NORTH, J.
March 8.
C. A.
April 8.

In re HOWE MACHINE COMPANY.

FONTAINE'S CASE.

Practice—Security for Costs—Judgments Extension Act, 1868 (31 & 32 *Vict. c.* 54) [*Revised Ed. Statutes, vol. xv., p.* 810]—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 76 [*Revised Ed. Statutes, vol. xvii. p.* 89]—*Rules of Supreme Court*, 1883, *Order* XLII., *r.* 24—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 122 [*Revised Ed. Statutes, vol. xiv. p.* 228].

Held, by North, J. that security for costs will not be required of the plaintiff in an action in any Division of the High Court who is resident in *Scotland* or *Ireland*, inasmuch as the judgment can be enforced in *Scotland* or *Ireland*, but that an order made on a claim in a winding-up is not a judgment enforceable in *Scotland* or *Ireland* under the *Judgments Extension Act*, 1868, and therefore a claimant in a winding-up resident in *Scotland* must give security for costs.

In re Vanderhaeye (1) discussed.

On appeal the Claimant adduced evidence that he had a large amount of property in *England* available for costs, and the order for security was discharged, the Court declining to give any opinion on the questions, whether an order in a winding-up can be enforced in *Scotland* or *Ireland* under the *Judgments Extension Act*, 1868, or whether, having regard to the *Companies Act*, 1862, s. 122, a claimant in a winding-up who resides in *Scotland* or *Ireland* ought to be ordered to give security.

ON the 19th of January, 1887, *François Fontaine* commenced an action in the Queen's Bench Division against the *Howe Machine Company, Limited*, to recover sums of money alleged to be due to him from the company and damages alleged to have been sustained by him by reason of wrongful conduct of the company. Pleadings in the action and notice of trial was given on the 26th of July, 1887, and the action was set down for trial. On the 28th of September, 1887, an order was made for winding the company up compulsorily.

On the 7th of November, 1887, the action was transferred to the Chancery Division. On the 27th of November, 1887, the action was stayed, and subsequently *François Fontaine* carried in a claim for the alleged debt and damages claimed in the action.

The Claimant was a domiciled Frenchman; he was now resident in *Glasgow*. An order had been made upon him in Chambers

(1) 20 Q. B. D. 146.

that he should give security for costs. A motion was now made on his behalf that the order requiring security for costs should be discharged.

Napier Higgins, Q.C., and *H. M. Finch*, for the motion:—

In proceedings in the High Court it is not the practice now to require security for costs from a litigant resident in *Scotland* or *Ireland*, because the *Judgments Extension Act*, 1868, renders a judgment pronounced in *England* in the Common Law Supreme Courts enforceable in *Scotland* or *Ireland*: *Raeburn* v. *Andrews* (1). Previously to the *Judicature Act*, 1873, that rule did not apply to the Court of Chancery, *In re East Llangynog Lead Mining Company* (2), because the Court of Chancery was not within the Act. But sect. 76 of the *Judicature Act*, 1873, brings proceedings in the High Court, whether in the Common Law or Chancery Division, or Probate Division, within the Act, for the High Court is to be read into the *Judgments Extension Act* as if it had been expressly named there: *Marris* v. *Ingram* (3).

But it is not the practice, independently of the *Judgments Extension Act*, that on a mere claim security for costs should be required from a person resident out of the jurisdiction: *In re Vanderhaege* (4).

The special circumstances are such that it would be inequitable to require security for costs. The Claimant had commenced an action which had gone so far as being set down for trial; in that he had not been required to give security. It was no fault of his that the action was stayed, and the Court will not put him in a worse position by reason of the winding-up proceedings having intervened.

NORTH, J.:—

I wish to hear you, Mr. *Hardy*, on two points only. I will give my reasons. Why I did not wish this case to go direct to the Court of Appeal is because the Court of Appeal always desires to know, if it can, the view of the Judge in the Court below, and also because it appeared to me that there was a point which,

(1) Law Rep. 9 Q. B. 118.
(2) 23 W. R. 587.
(3) 13 Ch. D. 338.
(4) 20 Q. B. D. 146.

C. A.
1889
FONTAINE'S CASE
North, J.

though it weighed on my mind, was not even put in Chambers and it has not been put here. The question raised was whether a claimant in a winding-up can be compelled to give security for costs. There was a well-settled practice that when a claim is made in a winding-up, in a proper case, the claimant should be required to give security for costs; the same rule applied in administration proceedings. If the person who comes in is resident abroad, or there is any other circumstance that makes it requisite to take security, it is required from him though he is not plaintiff in an action.

In the present case the Claimant brought an action against the company, in which the pleadings were closed. The next step was that a winding-up order was made. In the usual course of proceedings the action was stayed, and the Plaintiff was left to establish his claim in the winding-up. There is no complaint that there was anything irregular or improper in what was done as to that. The question is whether the Plaintiff in that action should give security for costs before being allowed to proceed with his claim in the winding-up. The old practice was that a plaintiff in an action who resided in *Scotland* should give security. The first step to interfere with that was the passing of the *Judgments Extension Act*, 1868. That Act is entitled "An Act to render Judgments or Decreets obtained in certain Courts in *England*, *Scotland*, and *Ireland* respectively effectual in any other part of the *United Kingdom*." The 1st section provides for the enforcement of judgments of the Courts of Queen's Bench, Common Pleas, and Exchequer at *Westminster* and *Dublin* respectively in *Ireland* and *England*. The 2nd section provides for the registration in *Scotland* of a certificate of a judgment of the Courts of Queen's Bench, Common Pleas, and Exchequer at *Westminster* and *Dublin*, and that every certificate so registered shall from the date of such registration be of the same force and effect as a decreet of the Court of Session. The 3rd section provides for the enforcement of decreets of the Court of Session in *Scotland* as judgments in *England* and *Ireland*. I need not refer to the 4th section. The 5th section is this: "It shall not be necessary for any plaintiff in any of the aforesaid Courts in *England* resident in *Ireland* or *Scotland*, or any plaintiff

in any of the aforesaid Courts in *Ireland* resident in *England* or *Scotland*, in any proceeding had and taken on such certificate, to find security for costs in respect of such residence, unless, on special grounds, a Judge or the Court shall otherwise order; nor shall it be necessary for any party to such proceeding in *Scotland* resident in *England* or *Ireland*, to sist a mandatory, or otherwise to find security for expenses in respect of such residence, unless, on special grounds, the Court shall otherwise order."

Now that seems to me to apply in terms simply to what is to be done as to security for costs in any proceedings had or taken on such certificate and nothing else, but after the Act was passed a case of *Raeburn* v. *Andrews* (1) came before the Court of Queen's Bench. In that case an action had been brought in the Court of Queen's Bench by a person who was residing in *Scotland*, and he was not required to find security for costs; that was decided, as the judgments clearly shew, upon this, that prior to the passing of the Act it had been necessary to get security for costs from persons suing who were resident out of the jurisdiction, in order that the persons sued might be enabled to enforce the judgment if made in their favour. When the law was that a judgment in *England* could itself be made a judgment in *Ireland* or a decreet in *Scotland*, there was no longer any necessity for such security. In that case the 5th section was relied upon, in that the alteration of the law as to security for costs was only addressed in terms to proceedings on a certificate; but what the Court held, and I agree entirely with the holding, was that the effect of the Act was larger, and that inasmuch as the judgment could be made a judgment in *Ireland* or a decreet in *Scotland* security would not be required. But that Act applied, in the case of English judgments, merely to judgments of the Courts of Queen's Bench, Common Pleas, and Exchequer. The next step in litigation on this subject was in the case of *In re East Llangynog Lead Mining Company* (2), before Sir *George Jessel*. He decided that the rule in *Raeburn* v. *Andrews* was confined to cases within the *Judgments Extension Act*, and it applied only to actions at law, and that security for costs must still be given in proceedings in the Court of Chancery.

(1) Law Rep. 9 Q. B. 118 (2) 23 W. R. 587.

C. A.
1889
FONTAINE'S CASE.
North, J.

The next step was the passing of the *Judicature Act*, 1873, which came into operation in 1875. The 76th section of that Act provides, to put it shortly, that all Acts of Parliament which relate to Courts whose jurisdiction was transferred to the High Court of Justice (a description which includes this Act) are to be construed and have the same effect as if the High Court had been named in such Acts instead of the Courts whose jurisdiction was transferred to the High Court of Justice. So the result was that what the law was as to security for costs in an action of law by reason of the *Judgments Extension Act*, became the law in actions both at law and in equity, so to speak, in the High Court of Justice; so that I take it to be clear that if a plaintiff resident in *Scotland* had commenced an action in the Chancery Division since the coming into operation of the *Judicature Act*, 1873, he would, having regard to sect. 76 of that Act, no longer be required to give security for costs.

But there is a point that was not discussed in Chambers and has not been discussed to-day. The *Judgments Extension Act* applies to judgments and nothing else. There is no provision in it by which anything else but judgments can be enforced in *Scotland* or *Ireland*. It is quite true that the result of the claim carried in by the Claimant will be that it will resolve itself into a finding by the Chief Clerk. Either the Chief Clerk will allow proof or he will disallow proof. That will be the end of the litigation, unless the matter is brought into Court, where the certificate will be put right if wrong. The result will be that there will be a certificate that the Claimant is a creditor for some amount, or that he is not a creditor. How that certificate can be enforced in *Scotland* or *Ireland* I am at a loss to understand. If it were a question of being enforced in *England*, our own orders would provide for the matter. By Order XLII., rule 24, it is provided: "Every order of the Court or a Judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." If, therefore, that claim was made by a person resident in *England*, the decision on the claim could be enforced against him in exactly the same way as a judgment could, though an order only. I do not understand how under the *Judgments Extension*

Act any such order could be enforced in *Scotland* or *Ireland* at all. And I find a note in the Annual Practice, 1888–9 (1), that "The Irish Court of Queen's Bench refuses to be bound by this rule to the extent of registering, under the *Judgments Extension Act*, a certificate of an order for payment of money." That is only a statement in a book, but it is a statement in accordance with the view I have come to. Therefore, though an order made on a claim in a winding-up may be enforced in *England* like a judgment, it cannot be enforced as a judgment in *Scotland* or *Ireland*. If I thought it could be I should think the principle of *Raeburn* v. *Andrews* (2) applied. But it seems to me clear that the orders of this Court for regulating the domestic procedure and practice are not binding on the Courts of *Scotland* and *Ireland* so as to enable them to enforce a mere order of this Court.

On that ground the motion fails. I hold that there is jurisdiction notwithstanding the *Judgments Extension Act* to order security to be given. But there are two points on which I wish to hear Mr. *Hardy*: first, on the case cited of *In re Vanderhaege* (3); secondly, on the question whether, as no security had been got in the common law action, the Claimant, whose action has been stayed, ought to find costs as a condition precedent to going on with his claim.

The Registrar has referred me to some observations of Lord Justice *Cotton* in a case of *Ex parte Chinery* (4), where he says: "That which the petitioning creditor in the present case has in fact obtained is a garnishee order absolute, and the question we have to consider is whether, on the fair interpretation of the words of the sub-section, such an order is a 'final judgment.' Now, in legal language, and in Acts of Parliament, as well as with regard to the rights of the parties, there is a well-known distinction between a 'judgment' and an 'order.' No doubt the Orders under the *Judicature Act* provide that every order may be enforced in the same manner as a judgment, but still judgments and orders are kept entirely distinct. It is not said that the word 'judgment' shall in other Acts of Parliament include an 'order.'" That is exactly in point. As the Lord Justice points out, the Orders under the *Judicature Acts* are merely our own domestic orders. They cannot of course affect the Courts of *Scotland*.

(1) Page 624.
(2) Law Rep. 9 Q. B. 118.
(3) 20 Q. B. D. 146.
(4) 12 Q. B. D. 342, 345.

C. A.
1889
FONTAINE'S CASE

The two points upon which I wish to hear you, Mr. *Hardy*, are, the case of *In re Vanderhaege* (1), and the question whether the Claimant's action having been stopped makes any difference.

Cozens-Hardy, Q.C., and *Archibald Brown*, for the Liquidator:—

In the first place, the case of *In re Vanderhaege* was a bankruptcy case, and the practice in winding-up does not apply in bankruptcy. It was not called to the learned Judge's attention that it is the practice in winding-up proceedings to require security for costs in a proper case.

If the action had gone on in this case security for costs would not have been required, because the judgment could be enforced in *Scotland*. It is no fault of the liquidator that the action did not go on, it stayed itself; the reason for requiring security having revived, security will be required.

Napier Higgins, in reply.

NORTH, J.:—

I think security ought to be given. There is, it is true, a *dictum* of Mr. Justice *Cave* in *In re Vanderhaege* (2), in which he says: "I think it would be oppressive to require a creditor resident abroad, who is prosecuting his claim to prove against a bankrupt's estate here in due course, to give security for costs of an appeal against the rejection of his proof by the trustee." That follows upon the remark of the Judge: "The counsel for the trustee was unable to produce any enactment or authority that security for costs can be ordered in such a case as this. The rules which have been referred to indicate the cases in which such security can be required, and that raises the *primâ facie* inference that it cannot be enforced in cases which are not mentioned in the rules."

If the learned Judge had been informed of the common practice in winding-up proceedings and suits for the administration of the estates of deceased persons to require persons making claims to give security if they are in such a position that security for costs ought to be required, I do not know what his view would have been. At any rate he was proceeding on different rules, with which I have nothing to do. The last point

(1) 20 Q. B. D. 146. (2) 20 Q. B. D. 147.

is, whether the fact that the Claimant had brought an action in the Common Law Division which was stayed affords any reason why security should not be given. After hearing all that is to be said on both sides I do not think it does afford such reason, for he is in no worse position. It is the *Companies Act* that stops his action and makes it incumbent on him to bring his claim. He might possibly have got leave to go on with the action: he did not apply. There is no greater burden cast upon him by reason of his having to make his claim in the winding-up. It is clear that no security for costs would have been required if he had gone on with the action, because the judgment in the action could have been enforced in *Scotland*. If the claim fails in the winding-up there will not be a judgment that can be enforced against him in *Scotland*. And it is only because he is in a better position in that respect in the winding-up, that the old rule that security for costs should be required applies, and the case is not within the principle of *Raeburn* v. *Andrews* (1). The motion therefore must be refused with costs.

D. P.

Fontaine appealed, and adduced uncontradicted evidence that he was possessed of stock in trade at several branch establishments of his in *England* to the value of about £13,000 in the whole. He also relied on the *Companies Act*, 1862, s. 122, which had not been brought to the attention of Mr. Justice *North*. The appeal was heard on the 3rd of April, 1889.

THE COURT (*Cotton*, *Lindley*, and *Fry*, L.JJ.) held that the fresh evidence disposed of the case, and that the order for security must be discharged. Their Lordships therefore considered it unnecessary to give, and declined to give, any opinion on the point of law decided by Mr. Justice *North*, or on the question whether, having regard to the *Companies Act*, 1862, s. 122, security ought in a winding-up case to be required from a claimant resident in *Scotland*.

Solicitors for Claimant: *Rollit & Sons*.
Solicitor for Liquidator: *J. W. Smart*.

(1) Law Rep. 9 Q. B. 118.

H. C. J.

KAY, J.

1889

Feb. 4, 5, 6.

MAINLAND *v.* UPJOHN.

[1888. M. 178.]

Mortgage—Mortgagor and Mortgagee—Commission—Bonus—Collateral Advantage—Fraud—Redemption Action—Account—Second Mortgagee Plaintiff—Equities of Mortgagor.

Where advances have been made by a mortgagee to a mortgagor upon security of a speculative character, such as a building estate, the Court will, in taking the account in a redemption action, allow to the mortgagee sums actually deducted by him for commission or bonus at the times of making the advances, provided the deductions were made as part of the mortgage contract, under a bargain deliberately entered into by the parties while on equal terms and knowing perfectly well what they were doing, and without any improper pressure, unfair dealing, or undue influence on the part of the mortgagee: the Court treating the transaction in each case as amounting in fact to the payment of the whole amount of the advance to the mortgagor and the return of a certain part of it to the mortgagee as a consideration for the accommodation.

Potter v. *Edwards* (1) followed.

Broad v. *Selfe* (2) and *James* v. *Kerr* (3) discussed.

In a redemption action by a second mortgagee against the first mortgagee, the account to be taken at the instance of the second mortgagee must be taken in all respects as though it were being taken at the instance of the mortgagor himself; and the second mortgagee may assert such equity as the mortgagor himself might have had to exclude any particular item from the account.

EARLY in the year 1886, *William Douglas*, who had for many years carried on an extensive business as a builder, applied to a firm of solicitors, in which the Defendant, *Arthur Ritchie Upjohn*, a young solicitor, had recently become a partner, to finance him, *Douglas*, during the erection of three houses on a piece of freehold land belonging to him at *Surbiton*. Considerable negotiations then followed between *Douglas* and the Defendant, *Upjohn*, the latter acting entirely on his own account and not on account of his firm, and it was ultimately agreed that the Defendant should advance to *Douglas*, on the security of the three houses at *Surbiton*, £1200 for each house, or £3600 in all; that *Douglas*

(1) 26 L. J. (Ch.) 468. (2) 11 W. R. 1036.
(3) 40 Ch. D. 449.

should pay the Defendant a commission of £60—or 5 per cent.—on each £1200, the Defendant to be at liberty to retain such commission out of the sums advanced, if not otherwise paid; and that *Douglas* should pay interest on the loan at the rate of 6 per cent. per annum.

In pursuance of that agreement, *Douglas*, on the 8th of July, 1887, executed a mortgage of the *Surbiton* property to the Defendant *Upjohn*.

The mortgage recited that the mortgagor, *Douglas*, being desirous of erecting three houses on his freehold land at *Surbiton*, had applied to *Upjohn*, the mortgagee, for a loan of £3600 to enable him to erect the same, and that the mortgagee had agreed to advance that sum to the mortgagor upon having the repayment thereof, with interest, secured in manner thereinafter appearing: that upon the treaty for the loan it had been agreed that the £3600 should, instead of being advanced immediately, be advanced by instalments, "if the mortgagee shall think fit so to do," upon the certificate of the mortgagee's architect or surveyor as the buildings proceeded, but that the whole of the £3600 should carry interest from the date of the present indenture. Then it was witnessed that the mortgagor covenanted to pay to the mortgagee, on the 25th of March, 1888, the sum of £3600, or so much thereof as should have been advanced, "and also to pay to the mortgagee interest on the full sum of £3600 (whether the whole or any part thereof shall have been actually advanced by the mortgagee to the mortgagor or not), calculated from the date of these presents at the rate of £6 per cent. per annum by equal quarterly payments; . . . . and also, as long after the said 25th day of March, 1888, as any principal money remains due under this mortgage, to pay to the mortgagee interest on the full sum of £3600 (whether the whole thereof shall or shall not have been advanced, and whether the whole thereof shall or shall not remain due under this mortgage), at the same rate by equal quarterly payments." And it was further witnessed that the mortgagor conveyed the piece of land at *Surbiton*, then intended to be the site of the three houses, to the mortgagee in fee simple subject to redemption on payment of the £3600, or of so much thereof as should have been advanced, and of all interest on the

KAY, J.
1889
MAINLAND
v.
UPJOHN.

full sum of £3600. And it was agreed that the mortgagee might deduct from the advances to be made by him the costs of his surveyor, and also "any moneys which the mortgagor may be liable to pay to the mortgagee in respect of interest, costs, or otherwise howsoever." Then the mortgage contained a stipulation that, in in the event of the mortgagor becoming bankrupt or committing any breach of the covenants, or of the mortgagee taking possession under the deed, "it shall be in the sole discretion of the mortgagee to make or continue such advances or not;" and that the security should extend to all sums which might be advanced by the mortgagee to or on account of the mortgagor, "although there may be no obligation to make or continue the said advances." Then followed building and other covenants by the mortgagor.

Under that mortgage, the Defendant *Upjohn* made advances to or on account of *Douglas*, amounting altogether to £1015; and in making each advance deducted a sum for commission at 5 per cent. and also interest, pursuant to the arrangement.

Douglas made default in proceeding with the erection of the three houses, whereupon *Upjohn*, under a power in the mortgage deed, expended certain sums towards their erection.

In August, 1887, *Douglas* applied to *Upjohn* for a temporary advance of £250, at the same time offering to pay for the accommodation a commission of 15 per cent. (equal to £37 10*s.*), to be deducted from the advance. *Upjohn* assented to the proposal and made *Douglas* an advance of £212 10*s.*, being £250 less the £37 10*s.* which latter sum it was agreed should cover all interest until the following month, when it was expected the advance would be repaid, the Plaintiff depositing with *Upjohn* certain documents by way of security. *Upjohn* subsequently made *Douglas* a further advance of £150, less £10 for commission, or for commission and interest, the deduction being made with *Douglas's* approval. Shortly afterwards *Douglas* requested *Upjohn* to advance him £900, by weekly instalments of £100 each, for the purpose of paying his weekly wages, and voluntarily offered to pay a commission of at least 7 per cent. for the accommodation, and to give as security for the £250 and £150 (making together £400) already advanced, and for the £900 to be advanced, a second mortgage on certain leasehold premises, 34, *Cadogan*

Square, which were then already subject to a first mortgage to a Mr. *Leman*. After some discussion, *Upjohn* accepted the proposal, and agreed to make the advances required by *Douglas*, and it was also agreed that *Upjohn* might retain the commission out of the advances, if not otherwise paid by *Douglas*. Accordingly, on the 9th of September, 1887, *Upjohn* advanced to *Douglas* £100, less £7 retained for commission, and on the same day *Douglas* executed to *Upjohn* a mortgage by sub-demise (subject to the prior mortgage to *Leman*) of 34, *Cadogan Square*, to secure the repayment of £500 (made up of the said sums of £250 and £150, and the last mentioned sum of £100) and further advances, with interest at 7 per cent. per annum; and the right was reserved to *Upjohn* of consolidating his mortgages, notwithstanding the *Conveyancing and Law of Property Act*, 1881. This mortgage did not contain any express stipulation, as in the case of the mortgage of the 8th of July, 1887, that the mortgagee might deduct from advances any sums for interest, costs, or otherwise.

Upjohn subsequently advanced to *Douglas*, under that mortgage, eight weekly sums of £100 each, beyond the £100 advanced on the date of the mortgage, *Upjohn* deducting from each advance, as arranged, £7 for commission.

On every occasion of an advance being made, *Douglas* gave *Upjohn* a receipt for the full amount, the receipt not shewing the deduction of commission.

In December, 1887, the Plaintiffs, as the executors of one *James Edell*, held a charge from *Douglas* on 34, *Cadogan Square*, this charge being subject to the prior mortgages of that property to *Leman* and the Defendant *Upjohn*; and in that month the Plaintiffs redeemed *Upjohn's* mortgages of the *Surbiton* property and the *Cadogan Square* property on payment to *Upjohn* of the sum of £2356 3*s.* 9*d.*, being the amount claimed by him to be due on those securities for principal, interest, commission, and costs. The Plaintiffs thus became first mortgagees of the *Surbiton* property and second mortgagees of the *Cadogan Square* property. No actual transfers, however, of his securities were executed by *Upjohn*, he refusing to execute them, it was said, unless the Plaintiffs admitted the accuracy of his account shewing the £2356 3*s.* 9*d.* to be due on his securities. The Plaintiffs

KAY, J.
1889
MAINLAND
v.
UPJOHN

paid the amount of *Upjohn's* demand, they said, under pressure, to prevent him from carrying out his threat to sell the *Cadogan Square* property; and they further asserted that they were compelled to redeem that property, and the *Surbiton* property also, through *Upjohn* insisting on his right of consolidation.

In January, 1888, the Plaintiffs commenced this action, claiming a declaration that the mortgages of the 8th of July, and 9th of September, 1887, ought to stand as security only for the principal sums actually advanced thereon, with interest at 4 per cent. per annum from the dates of the advances and costs; an account of what, upon the footing of that declaration, was properly due to the Defendant at the time the Plaintiffs paid him the £2356 3*s* 9*d.*; a declaration that the Plaintiffs were entitled to redeem upon payment to the Defendant *Upjohn* of what should be found due on such account; payment by the Defendant *Upjohn* to the Plaintiffs of the difference between the moneys due on such account and the said £2356 3*s.* 9*d.* actually paid to the Defendant, with interest on the amount of such difference at 4 per cent. per annum; an order on the Defendant to execute proper transfers of the two mortgages; and incidental relief.

Subsequently to the commencement of the action, *Douglas* was adjudicated bankrupt, and the trustees in his bankruptcy were made co-Defendants in the action, but they subsequently disclaimed and were dismissed.

In the statement of claim the Plaintiffs alleged that, when *Douglas* executed the two mortgages and signed the receipts for the several advances of sums he did not actually receive, he was completely under the influence of the Defendant *Upjohn* and was a mere instrument in his hands; and that he, *Douglas*, was wholly ignorant of legal matters, did not understand what he was doing, and had no independent advice; also that the Defendant *Upjohn* had refused to furnish the Plaintiffs with a detailed account shewing how the £2356 3*s.* 9*d.* paid by them to him was made up; and they insisted that part of that sum represented commission which had not been deducted at the time of making some of the advances, but which the Defendant *Upjohn* claimed to be allowed under some alleged agreement with *Douglas*, the existence of which was denied by the Plaintiffs and was not in

fact proved; also that the Defendant *Upjohn* ought not to be allowed commission at all on any of the advances.

In his statement of defence the Defendant *Upjohn* alleged —and this was proved—that at the time of the transaction in question, *Douglas* was a person of mature age who had for about thirty years carried on a very extensive business as a builder at *Chelsea*, *Kensington*, and elsewhere: that he had carried on his building operations entirely by means of moneys borrowed on building securities, and that he was in the habit of himself negotiating and settling the terms of the loans without the intervention of any solicitor, and was thoroughly conversant with such legal matters as were incident to such transactions: and that he was in fact a person of greater experience and skill in such matters than the Defendant *Upjohn*, who was then a young solicitor who had only recently gone into practice. The Defendant *Upjohn* further alleged, and it was proved, that *Douglas* thoroughly understood the nature of the transactions, the terms of which were proposed by *Douglas* himself: that the mortgages were read over and explained to him, that he himself perused them before he executed them, and thoroughly understood them; also that he was perfectly aware, when he signed the receipt for the full amount of the advance in each case, that the amount retained by *Upjohn* out of the advance was for commission pursuant to the arrangement between them; and *Upjohn* in his defence pleaded a settled account as between himself and the Plaintiffs, but to save further expense and litigation, offered to submit to an account being taken of what was due to him for principal, interest, commission, costs, and otherwise in respect of advances on the mortgaged properties, and for his expenditure on those properties. He contended that he was entitled to consolidate his securities, and that the Plaintiffs were not entitled to redeem, except upon payment of the moneys secured, including commission.

The action now came on for trial.

The main question for decision, and the only point in the case requiring a detailed report, was whether, in taking the account in the action as between mortgagor and mortgagee, the mortgagee should be allowed the commission which had been deducted

KAY, J.
1889
MAINLAND
v.
UPJOHN.

by him on making the several advances; or whether the mortgagor should be charged only with the sums actually received by him. Another incidental point, but one which it is only necessary to notice shortly, was whether in a redemption action by a second mortgagee the plaintiff is entitled to assert the same equities that the mortgagor might himself have asserted had he been plaintiff.

Marten, Q.C., *Willis*, Q.C., and *MacSwinney*, for the Plaintiffs:—

The arrangement under which the Defendant *Upjohn* was to be paid or retain a commission is contrary to the well-established doctrine that a mortgagee cannot stipulate with his mortgagor for an advantage collateral to the mortgage; or, as it has been said, "clog the redemption with any by-agreement": *James* v. *Kerr* (1); *Jennings* v. *Ward* (2); *Broad* v. *Selfe* (3); *Eyre* v. *Hughes* (4); *Barrett* v. *Hartley* (5). Any claim in respect of commission is therefore improper. We are, at least, entitled, in taking the account, to have charges for commission not actually deducted at the time of the advances disallowed.

Sir *H. Davey*, Q.C., and *Upjohn*, for the Defendant *Upjohn*:—

We submit that the arrangement between the Defendant and *Douglas*, which was deliberately made, ought to be allowed to stand. Third persons, such as the Plaintiffs are, have no right to come to set aside a transaction of this kind. The equity, if any, is the personal equity of the person between whom and the mortgagee the transaction took place. As to the right of a mortgagee to stipulate for commission, it is true that in the recent case of *James* v. *Kerr* your Lordship adopted and applied the old rule of law that an equity of redemption cannot be clogged with anything beyond payment of principal and interest; but most of the cases in which that rule has been recognised were decided before the abolition of the usury laws, and proceeded upon the ground of usury. In the old case of *Jennings* v. *Ward*, which is usually cited as an authority for the doctrine,

(1) 40 Ch. D. 449.
(2) 2 Vern. 520.
(3) 11 W. R. 1036; 9 Jur. (N.S.) 885.
(4) 2 Ch. D. 148.
(5) Law Rep. 2 Eq. 789.

the mortgage was, in effect, irredeemable. In the more modern cases there has been some independent and distinct ground of equity arising out of the relation of the parties. For instance, in *Broad* v. *Self* (1), the contract was that the mortgagees should act as auctioneers; and the Master of the Rolls held that inasmuch as he could not enforce that contract he could not give relief. There the contract was quite separate and distinct from the contract of mortgage. Again, *Eyre* v. *Hughes* (2) was the case of a solicitor taking a mortgage from his client, and of this solicitor, being a mortgagee in possession, attempting, in a foreclosure action, to take advantage of a stipulation in the mortgage deed for commission on receipt of rents. It was there held that a mortgagee cannot, before and as a condition for the advance, stipulate for a commission for himself if he enters into possession. That case, therefore, does not bear out the proposition for which it was cited. *Barrett* v. *Hartley* (3) was also the case of a mortgagee in possession, and also of pressure on the mortgagor. If the observations of *Stuart*, V.C., in that case (4) mean that a new doctrine has been introduced since the repeal of the usury laws, we submit that there is no authority to be found for such a proposition. Assuming that the contract between a mortgagor and mortgagee is not otherwise impeachable, there is no reason why a stipulation in it for payment of a commission or bonus should not be valid. Commission or bonus is only interest in another form. There is no magic in the word "interest." Interest may be paid in advance; it may be £5 one year and £10 the next; it may be paid in a lump sum in respect of several years. The question is one of accommodation—what will the borrower give the lender for the accommodation required? The borrower may say he prefers to pay a lump sum for interest on receiving the advance, or, instead of interest, a bonus at the end of the loan. Taking the case of an advance of £1000 for five years at 6 per cent., the borrower might say "Instead of paying 6 per cent. for five years, I will pay £50 down and £50 each year." *Potter* v. *Edwards* (5) is a distinct

(1) 11 W. R. 1036; 9 Jur. (N.S.) 885.
(2) 2 Ch. D. 148.
(3) Law Rep. 2 Eq. 789.
(4) Ibid. 795.
(5) 26 L. J. (Ch.) 468.

KAY, J.
1889
MAINLAND
v.
UPJOHN.

authority that there is nothing unlawful in stipulating for the payment off of a loan with a bonus; in other words, that it is competent to two parties to make their own terms for the accommodation one of them may require. For instance, a mortgagee may stipulate for compound interest: *Clarkson* v. *Henderson* (1); *Coote* on Mortgages (2). *Potter* v. *Edwards* (3) is cited as an authority in *Fisher* on Mortgages (4) and *Coote* on Mortgages (2). The contract in a mortgage to pay commission is wholly separate from the contract to pay interest; it is not an agreement in the nature of a penalty: *General Credit and Discount Company* v. *Glegg* (5). It is a common practice for limited companies to issue their debentures at a discount, or give the lenders a bonus on paying off the debentures; it has never been alleged that such a contract is unlawful *per se*, the only question that has arisen in such cases being whether the contract is authorized by the articles of association: *In re Anglo-Danubian Steam Navigation and Colliery Company* (6). Upon the whole we submit that there is no authority for saying that, where the parties are at arm's length, a contract to advance money in consideration either of a contract to pay off a larger sum than that actually advanced, or for a contract to pay a bonus or commission, is *per se* unlawful; and the Court will not, at the present day, introduce new provisions into contracts between borrowers and lenders. We admit that, in the absence of any distinct contract, there is some difficulty in contending that we are entitled to charge commission as yet unpaid, but we submit that, as regards commission already deducted, that ought to be allowed in taking the accounts as between mortgagor and mortgagee.

Marten, in reply:—

Potter v. *Edwards* is a different case from the present; there the question was as to the intention of the mortgagor and mortgagee, upon which parol evidence was rebutted by parol evidence. Moreover, it related only to one advance made upon the execution of the mortgage, and not to subsequent advances. The case

(1) 14 Ch. D. 348.
(2) 4th Ed. p. 871.
(3) 26 L. J. (Ch.) 468.
(4) 4th Ed. p. 230.
(5) 22 Ch. D. 549.
(6) Law Rep. 20 Eq. 339.

has not been referred to in any subsequent cases except in *Tyler* v. *Yates* (1), and there only in the argument. None of the cases upon the question whether a mortgagee is entitled to a collateral advantage were cited in *Potter* v. *Edwards* (2), and the point does not really seem to have been argued; accordingly I submit your Lordship is not fettered by that decision in any way.

As to *General Credit and Discount Company* v. *Glegg* (3), that decision was not intended to interfere with the doctrine that a mortgagee shall not have a collateral advantage, and that point was not, in fact, argued. *Clarkson* v. *Henderson* (4) was the case of a mortgage of a reversionary interest, and involved different considerations from those in the present case.

In *In re Anglo-Danubian Steam Navigation and Colliery Company* (5) the only point argued was whether, upon the construction of the articles, the company had power to issue bonds at a discount. It does not appear from the report whether or not the debentures created a charge on the property or undertaking of the company; if they did not, the case has nothing to do with the present case, which is that of mortgagor and mortgagee. The question here is, whether the terms of this mortgage transaction were not so oppressive as that the Court will relieve the mortgagor when now seeking to redeem.

KAY, J.:—

The Plaintiffs have brought this action in the character of second mortgagees seeking to redeem a prior mortgage, and also to reduce the amount payable in respect of that mortgage by lowering the rate of interest to 4 per cent. and allowing for principal only the sums actually advanced, and to have the account taken on that footing. They plead, among other things, that, when the mortgage was executed, the mortgagor was completely under the influence of the mortgagee, and was a mere instrument in his hands; that the mortgagor was wholly ignorant of legal matters; and that when he executed the mortgage—or mortgages, for there were two—and signed the receipts for the

(1) Law Rep. 6 Ch. 665.
(2) 26 L. J. (Ch.) 468.
(3) 22 Ch. D. 549.
(4) 14 Ch. D. 348.
(5) Law Rep. 20 Eq. 339.

KAY, J.
1889
MAINLAND
v.
UPJOHN.

advances, he did not know or understand what he was doing, and had not any independent advice. That is the charge made against the Defendant *Upjohn*, but it is a charge which is not in any way supported by the evidence; I find no trace in the case of anything like fraud.

[His Lordship then dealt with the question whether such equities as *Douglas*, the mortgagor, might himself have been entitled to insist on had passed to the Plaintiffs in the character of second mortgagees, and held, as a matter of law, citing *Melbourne Banking Corporation* v. *Brougham* (1), that the account to be taken as against the first mortgagee at the instance of a second mortgagee must be taken in all respects as though the mortgagor himself were taking it; and that, if the mortgagor would have had an equity to exclude any item in the account, that was an equity which could be asserted by the second mortgagee. His Lordship then stated the facts of the case, and proceeded as follows:—]

I have now to deal with that which is the material part of this case, and it raises a question of very considerable interest and importance, namely, what sort of collateral advantage can a mortgagee stipulate for and take from his mortgagor, now that the usury laws have been abolished by the Act of 1854 (17 & 18 Vict. c. 90)? Before that time it was very well settled that collateral advantages could not be insisted upon by a mortgagee. There are many ways in which the equity to redeem was defended by stringent provisions laid down by the Court which created that equity. Among them there was first of all this: that the amount stated in the mortgage deed to be advanced was never conclusive. The mortgagor, or anybody claiming under him, was always at liberty to shew, if he could, that that amount had not been actually all advanced. Another was this: a stipulation capitalising interest, turning it into principal and charging interest upon it, however formally expressed, was not allowed to prevail. A stipulation that a mortgagee if he entered should be paid a commission for receiving the rents was always defeated; and it is not now, according to the latest authorities, allowed to prevail; and further, a stipulation that the interest should be paid at one rate,

(1) 7 App. Cas. 307, 311.

but that, if not paid at the day, the rate should be increased, always was held to be void. These are the rules of equity which, in the jurisdiction which has been sometimes called the "paternal" jurisdiction of Courts of Equity, were forced upon a mortgagee, whatever contract he chose to make with the mortgagor; the Court did interfere with his contract, interfered in all the respects I have mentioned, and, so to speak, altered the contract between the mortgagor and mortgagee by disallowing these advantages for which the mortgagee had stipulated. Many of the old cases occur in *Vernon*, but I do not know anywhere a better statement of what the law of the Court was in those respects than that which is contained in Lord *Eldon's* words in *Chambers* v. *Goldwin* (1). He says (2): "It is clear, the mortgagee cannot originally covenant for a collateral advantage: also, if upon the true effect of the instrument there is nothing more than that the mortgagee shall do what a mortgagee ought to do as trustee, there is no pretence to say, the trust is distinct from the mortgage. There is nothing unfair, or perhaps illegal, in taking a covenant originally, that, if interest is not paid at the end of the year, it shall be converted into principal. But this Court will not permit that; as tending to usury; though it is not usury. So a mortgagee cannot stipulate to be receiver of the rents and profits with a commission. In one case that has been considered by the Court of King's Bench usurious. But it has been long determined here, that though a mortgagee may stipulate for a receiver, to be paid by the mortgagor, and may appoint a bailiff, &c., he cannot himself stipulate for any advantage beyond the interest; and though it seems to make little difference to the mortgagor who is receiver, yet this Court considers it as tending to usury and oppression, and a collateral advantage; which a man contracting for a loan of money shall not make. So upon this contract: if a mortgagee stipulates to enter and take possession, as trustee, and do a variety of acts he ought to do, whether he stipulates, or not, he not only shall not have any advantage from it, but his stipulating for it might, perhaps, affect his right to the money lent. Upon the general rule also, independent of contract, a mortgagee or trustee cannot charge

(1) 9 Ves. 254. (2) 9 Ves. 271.

KAY, J.
1889
MAINLAND
v.
UPJOHN.

anything beyond what he paid to the person, for whose estate he is accountable."

I read that for this reason, that Lord *Eldon* there, although no doubt one objection he makes to these exactions was that they tend to usury, still does not rest his objection entirely upon that ground. He says, besides, that they are oppressive, and are exactions that a mortgagee is not allowed to make. It is a very interesting question indeed, and one which I certainly do not consider is at present finally settled, how far the abolition of the laws against usury has affected this jurisdiction, or the extent to which the Court will exercise its jurisdiction, as between mortgagor and mortgagee.

I had occasion recently in *James* v. *Kerr* (1) to refer to one case which has occurred since the abolition of the usury laws, namely, the case of *Broad* v. *Selfe* (2), which was decided in the year 1863. I have read that case again with considerable attention and will make a rather more full statement of it than I did on the former occasion. In that case the mortgage was effected by a memorandum of agreement in 1861 between *Broad* and two persons named *Pritchard* and *Selfe*. It recited that in consideration of *Broad* and *Pritchard* advancing to *Selfe* "the sum of £200 upon the security of a piece or parcel of land known as *The Park, Surbiton Hill*, &c., the said *John Selfe* hereby authorizes and instructs the said *Peter Broad* and *Taylor Pritchard* to sell and dispose of the whole or any portion of the land as above named, either by private or public sale, at and for the best price that can be obtained; and further, to repay themselves out of the proceeds of such sale the said sum of £200, with interest at the rate of 5 per cent. per annum from the date hereof, with a commission of 5 per cent. on the amount realized, and the expenses attending the sale thereof; and in the event of the said *J. Selfe* repaying the said *P. Broad* and *T. Pritchard* the aforesaid sum of £200 and interest, the said *J. Selfe* shall pay to the said *P. Broad* and *T. Pritchard* a commission of 5 per cent. on the value of the said property, together with all the expenses incurred by them, whether the property or any portion thereof is sold by any other agency or retained by the said *John Selfe*." A commission,

(1) 40 Ch. D. 449. (2) 11 W. R. 1036.

therefore, was to be paid. The lenders were auctioneers. They were to have, first of all, the right of selling the property to repay themselves their principal and interest, and if they sold they were also to retain this commission of 5 per cent. on the amount realized; but even if they did not sell—if *Selfe* paid them off and himself sold the property, or did not sell it but retained it, and it was not sold at all—they still were to have this commission. In fact, the property was not sold, and the mortgagees had made preparations for selling, but the defendant revoked their authority to sell and tendered to them the principal money and interest without the commission. Then the question came before the Master of the Rolls, Lord *Romilly*, to consider whether the commission was payable or not. Of course, it would only be payable, if at all, under the second alternative, the property not having been sold, namely, the alternative which provided for commission to be paid to the mortgagees whether the property was sold or not. Lord *Romilly* said this (1): "The contract in this case was only a contract of mortgage to the extent of £200 principal and the interest upon it; but not beyond this. His Honour thought that the cases referred to by Mr. *Roberts*"—including *Chambers* v. *Goldwin* (2), which I have already mentioned—"and several others which he had consulted, shewed the principle that the Court would not permit a person, under the colour of a mortgage, to obtain a collateral advantage not belonging or appurtenant to the contract of mortgage. Although this principle, in its origin, probably had reference to the usury laws, it went, in His Honour's opinion, beyond them, and was not affected by their repeal." There we have a most emphatic statement by a very experienced Judge that, in his opinion, the stipulation for a collateral advantage by way of bonus to be paid when the mortgage debt is paid off is a thing which is not permitted between mortgagor and mortgagee, notwithstanding the abolition of the usury laws. The mortgage in that case was dated, as I have said, in 1861, considerably after the usury laws were abolished.

On the other hand, my attention has been called to a case

(1) 11 W. R. 1037. (2) 9 Ves. 254.

KAY, J
1889
MAINLAND
v.
UPJOHN.

before a very learned Judge, *Potter* v. *Edwards* (1), which came before the late Vice-Chancellor *Kindersley*. That case was much earlier, it was in the year 1857; and I have referred to the registrar's book, which entirely supports the report in the *Law Journal*, where, I believe, it is alone reported. It was a suit for the redemption of a mortgage—a mortgage to secure £1000, with interest at 5 per cent. The receipt was signed for £1000, but in fact only £700 was paid. No money was actually advanced at the date when the mortgage deed was executed, but subsequently £700 was advanced in two sums of £160 and £540. The plaintiff tendered £700, but the defendant refused to take less than the entire sum of £1000, and then the bill was filed for redemption. The defendant, the mortgagee, said in his answer that he had offered to advance £700 only on the terms of having a mortgage for £1000, the remaining £300 being a bonus proportioned to the risk, and that the plaintiff fully understood and agreed to this offer. The authorities which have been cited before me in the present case do not seem, according to the short report, to have been referred to in that case, nor was any special reference made to the law that a mortgagee shall not have any collateral advantage. The only authorities referred to were *Croome* v. *Lediard* (2) and *Phillipps* on Evidence (3). *Croome* v. *Lediard* I have looked at. It is only a case on the law of evidence, as to how far you can contradict a written instrument. Vice-Chancellor *Kindersley*

(1) 26 L. J. (Ch.) 468. Since the decision in the principal case the reporter has ascertained, by a search at the Public Record Office, that the date of the mortgage in *Potter* v. *Edwards* was subsequent to the repeal of the usury laws. The reference to the record is Chancery Orders B, 1856, p. 1114, where the decree is entered, so far as is material, in the following form:—

"This Court doth declare that the mortgage and collateral security of the 6th day of July, 1855, in the plaintiff's bill respectively mentioned, ought to stand as security for the repayment to the defendant, *Thomas Edwards*, of £1000 and interest thereon at the rate of £5 per cent. per annum." Account directed of what is due to the defendant, *Edwards*, on the mortgage security and for his costs of suit, such costs to be taxed: and on the plaintiff paying to the defendant, *Edwards*, what shall be certified to be due for principal, interest, and costs, within six months after certificate, the defendants to deliver up the mortgage and collateral security: but, in default, ordered that the plaintiff's bill, as against the defendant, *Edwards*, be dismissed with costs.

(2) 2 My. & K. 251.

(3) Vol. ii. p. 346.

says (1): "It does not appear to me that there is any contradiction of the statements made by the defendant respecting the facts of this case. They are distinctly set forth in the answer, and supported by affidavit. The intention of the parties, therefore, seems to have been that £700 only was to be advanced, although the mortgage was to be a security for £1000. The security appeared, and with justice, to be of a questionable character, and the defendant in fact agreed to lend no more than £700 upon having a mortgage for £1000, in consideration of the risk and hazard attending the transaction." Then the Vice-Chancellor says that he thinks the whole £1000 must be paid before the mortgage can be redeemed. So that there I have the distinct authority of a Judge who, although the point was not argued, was a very accomplished lawyer, and from whose mind, if there had been anything in the question, the point certainly could not have been absent—that, upon a loan of money on a risky security, it is legitimate, between mortgagor and mortgagee, to deduct from the actual amount a very considerable bonus—in that case as much as £300 out of £1000; and that where that is deliberately done, and the parties completely understand one another, the mortgagor cannot afterwards reopen it, but is bound to let his property remain as a security, not for the money he actually received, but for the larger sum expressed to have been advanced. I am told that no case can be found in which *Potter* v. *Edwards* (2) has been cited since, except one, which did not determine the same point. But the case has found its way into the text-books, and I find it cited as an authority in Mr. *Fisher's* work on Mortgages. Accordingly, if this be an alteration in existing law, it is an alteration which has the sanction of a Judge of very considerable position: but it does not appear whether the mortgage in that case was a mortgage made after the abolition of the usury laws, for the date of it is not given in the report, and the only reference in the report to the usury laws is in the argument, in which it was said that there was no breach of the usury laws in the transaction. Possibly it may have been a mortgage before the usury laws were abolished; and the learned Judge seems to have thought that, whether the usury laws existed or not, there

(1) 26 L. J. (Ch.) 469. (2) 26 L. J. (Ch.) 468.

KAY. J.
1889
MAINLAND
v.
UPJOHN

was nothing in a transaction of that kind which was obnoxious to any law recognised in these Courts as between mortgagor and mortgagee.

Then reference has been made to the case of *In re Anglo-Danubian Steam Navigation and Colliery Company* (1), before the late Master of the Rolls, who, as we all know, had every point of equity at his fingers' ends. The case arose as to the debentures of a railway company, the question being whether the debentures could be issued at a discount. I agree, it does not appear whether the debentures were in the nature of a mortgage deed or a bond; therefore that case is not very satisfactory on that ground: but the learned Judge in that case, considering the directors had, under the particular constitution of that company, power to issue mortgages at a discount, never referred at all to any difficulty arising from the law of mortgages. The case is not at all conclusive on the question as to the law of mortgages, because, as I have said, it does not appear whether the debentures were in fact mortgages or not: the report only speaks of them as "securities." That would not be, in ordinary phraseology, inappropriate, even if they were only bonds, bonds being considered personal securities, and very often mentioned as such, even by lawyers.

Then the case of *General Credit and Discount Company* v. *Glegg* (2) was referred to, but in that case the point did not really arise. I must treat the principal authorities on this point, namely, as to what effect the abolition of the laws of usury has had upon the ordinary law which this Court administers between mortgagor and mortgagee, as illustrated chiefly by the two cases of *Broad* v. *Selfe* (3) and *Potter* v. *Edwards* (4), to which I have already referred.

There is one other case which is of some importance: I mean *Clarkson* v. *Henderson* (5). That was a case before Vice-Chancellor *Hall*, who held that a mortgage of a reversion, in which compound interest until the reversion fell in was secured, was a mortgage which the Court would support, notwithstanding the rule that

(1) Law Rep. 20 Eq. 339.
(2) 22 Ch. D. 549.
(3) 11 W. R. 1036; 9 Jur. (N.S.) 885.
(4) 26 L. J. (Ch.) 468.
(5) 14 Ch. D. 348.

you cannot turn interest into principal. Something may possibly have turned in that case upon the fact that it was a mortgage of a reversion; but that again was a case since the abolition of the usury laws.

I have, therefore, to consider in this case, first of all, with reference to these commissions, whether these commissions are to be allowed as between mortgagor and mortgagee; of course, if they are allowable between mortgagor and mortgagee, the equity of the second mortgagee cannot be higher than that of the mortgagor. Sir *Horace Davey* has stated frankly that, as to commissions that have not been paid but were charged in the account, he should not insist upon them—and for this very simple reason, that neither of the mortgages to Mr. *Upjohn*, either of the *Surbiton* property or of the *Cadogan Square* property, said a word about commission, and the agreement for commission was an agreement which was made entirely outside these mortgages; accordingly, it would be impossible, if the mortgagor insisted that it was not part of the mortgage contract, that the Court should import into that mortgage contract a collateral parol agreement of that kind. Sir *Horace Davey* was justified in saying that Mr. *Upjohn* could not insist on any commission which had not actually been paid, but he said—and this is really the turning point to my mind on this part of the case—that where the commission had actually been paid the transaction amounted in fact to this—the payment by the mortgagee of the whole amount of the advance to the mortgagor and the return by the mortgagor of a certain part of it to the mortgagee. It does not matter whether the money was actually paid over in cash and then repaid. If two persons not only understand what they are about—and I have no doubt that in this case Mr. *Douglas* did thoroughly understand what he was about—if those persons meet and one says to the other, "Now I will lend you £1000 upon condition that out of it you pay me a certain sum as commission for that loan," and the transaction is concluded there and then on that basis, and only a portion of the £1000, deducting the bonus, is paid over, that is equivalent to the payment over of the full amount of the £1000, and a repayment out of it of the bonus. If the mortgagor has been deceived, or taken by surprise, or if there has been any

KAY, J.
1889
MAINLAND
v.
UPJOHN.

oppression or improper dealing in the matter, there is ample equity, of course, to set it right on that ground; but if both parties know precisely what they are doing, and this is voluntarily done, and done in pursuance of a deliberate bargain, how a mortgagor can possibly say to a mortgagee, "Pay that money back to me," I cannot conceive. It is impossible. The money can only be recovered when it has been paid over under a mistake of fact, or under some pressure—some advantage taken of the payer which disentitles the payee to retain the money. But where no such advantage has been taken, where there has been no such improper pressure, if the parties are completely on equal terms, all I can say is that the money in such a case as that must be treated as having been actually paid by the mortgagor to the mortgagee as an inducement to lend the rest of the amount; and then, I conceive, the mortgagor has no right to recover it, nor has he any right to complain that the whole amount is charged against him in the mortgage deed. Of course, all this is quite independent of any case of improper dealing, exorbitant amount, great oppression, dealing with an ignorant person who has not got proper advice, and so on. All cases of that kind I entirely exclude; but, treating for the moment both parties as being on completely equal terms, one not at all under the influence of the other, both bargaining and knowing perfectly well what they are about, in my opinion, money so paid over cannot legally be claimed back, nor can a mortgagor say to the mortgagee in such a case, "Though I have paid you that money and agreed that it should be received by you as a consideration for the advance you have made me, I will strike it out of the mortgage account." Therefore, as to the moneys which have been actually paid, my opinion would be, independently of *Potter* v. *Edwards* (1), that they could not be recovered, nor could they be struck out of the mortgage account. But I take *Potter* v. *Edwards* to be a complete authority on that subject: it is an authority which certainly I should not venture to depart from, unless I were obliged to do so by some higher or greater authority than Vice-Chancellor *Kindersley*. Accordingly, as to all the commissions actually paid, I hold there can be no

(1) 26 L. J. (Ch.) 468.

repayment, nor any striking out in any way from the mortgage account.

His Lordship then dealt with an objection by the Plaintiffs that the Defendant *Upjohn* had, for a period prior to the *Surbiton* mortgage, charged interest at 6 per cent. on a sum of £3000 (part of the mortgage debt of £3600) which the Defendant alleged, had, under an arrangement with *Douglas*, been kept at call and was to carry interest at 6 per cent. His Lordship held that it had been proved that the whole of the money had not been kept at call, and accordingly disallowed the interest on such part of the £3000 as had not been kept at call.

Then, as to the Plaintiffs' charges of undue influence on the part of the Defendant *Upjohn*, his Lordship said that, having regard to *Douglas's* long experience in transactions relating to building loans, and the Defendant *Upjohn's* youth and comparative inexperience in such matters, it was clear that *Douglas* was perfectly able to take care of himself: that the case was in no sense one of oppression, unfair dealing or imposition on the part of a mortgagee, so as to fall within the observations of Vice-Chancellor *Stuart* in *Barrett* v. *Hartley* (1): also that the commissions charged, even under the *Cadogan Square* mortgage, were not, having regard to the risk and other circumstances in the case, so exorbitant as to indicate anything like fraud. His Lordship, however, held that the Defendant *Upjohn* had been wrong in setting up, by way of defence, a settled account, and that he ought to have delivered an account as demanded by the Plaintiffs.

His Lordship accordingly gave judgment to the following effect, so far as need be stated for the purpose of this report:

Direct an account of what is due to the Defendant *Upjohn* upon his two mortgage securities: in taking that account allow the sums actually deducted for commission at the times of making the advances, and disallow all other sums for commission.

Then an inquiry was directed as to how much of the £3000 had been kept at call by the Defendant *Upjohn* prior to the *Surbiton* mortgage, and was therefore chargeable with interest at 6 per cent. according to the arrangement with *Douglas*.

(1) Law Rep. 2 Eq. 789, 795.

KAY, J.
1889
MAINLAND v. UPJOHN.

Then his Lordship directed the Defendant *Upjohn* to pay the costs of the action up to and including the trial, except so far as they had been occasioned by the Plaintiffs' charges against him of oppression, undue influence and unfair dealing, which part of the action his Lordship dismissed with costs; subsequent costs being reserved. Then followed the usual redemption directions in other respects, with liberty to apply.

Solicitors: *Edell & Powell: Ward, Perks, & McKay.*

G. I. F. C

KAY, J.
1889
Feb. 23.

In re CRITERION GOLD MINING COMPANY.

Company—Winding-up Petition—Withdrawal—Costs.

There is no general rule that when a petition for the winding-up of a company is withdrawn by the petitioner, shareholders and creditors appearing, whether to support or oppose the petition, are entitled to separate sets of costs. The Court, in the exercise of its discretion, will have regard to the circumstances of each particular case.

Where a winding-up petition was withdrawn by the petitioners, in consequence of an arrangement made between them and the company for securing payment of the petitioners' debt, shareholders appearing to oppose were allowed one set of costs only.

THIS was a petition presented by *E. L. Ernest, T. L. Budd,* and the *Witwatersrand Gold Fields Syndicate, Limited,* as creditors, for the winding-up of the above company.

In March, 1888, the company borrowed of the petitioning syndicate a sum of £500 on a promissory note. In July, 1888, a resolution was passed for the voluntary winding-up of the syndicate, and the Petitioners, *Ernest* and *Budd,* were appointed liquidators; and on the 4th of August, 1888, an order was made continuing the voluntary winding-up under the supervision of the Court.

With the leave of the Court *Ernest* and *Budd* brought an action against the company on the promissory note, and recovered judgment for £524 16*s.* 6*d.* The judgment remained unsatisfied, and this petition was presented with the leave of the Court obtained in the winding-up of the syndicate.

The petition was duly advertised, and came on for hearing on the 9th of February, 1889, when the hearing was adjourned at the instance of the Petitioners with a view, as was stated, to a settlement between the Petitioners and the company. It again stood over on the 16th of February, and came on again for hearing on the 23rd of February.

Two shareholders appeared separately to oppose the petition.

Beddall, for the Petitioners, now stated that an arrangement had been arrived at, with the sanction of the Court, between the Petitioners and the company, whereby security was to be given for the debt of the Petitioners, and asked that the petition should be dismissed upon the terms so arranged.

Macaskie, for a shareholder:—

I ask for my costs. The decisions of Mr. Justice *Chitty* in *In re North Brazilian Sugar Factories* (1) and Mr. Justice *North* in *In re Paper Bottle Company* (2), have established the rule that where a petition is withdrawn by the petitioner all parties, whether creditors or shareholders, and whether appearing to support or oppose, are entitled to their costs. The rule is a reasonable one. If the petition is heard on the merits costs are allowed out of the estate to the parties who are successful, but if the petition is withdrawn the Court cannot tell which are the successful parties, and allows costs to everyone who has properly appeared upon the invitation of the petitioner contained in the advertisement of the petition.

[He referred also to *In re Nacupai Gold Mining Company* (3).]

[KAY, J., referred to *In re Peckham Tramways Company* (4), where Mr. Justice *Chitty* explained his previous decision in *In re North Brazilian Sugar Factories*; to *Buckley* on the *Companies Acts* (5), and to the following cases: *In re Marlborough Club Company* (6); *In re Humber Ironworks Company* (7); *In re Times Life Assurance and Guarantee Company* (8); *In re Home Assurance*

(1) W. N. 1887, p. 3; 56 L. T. (N.S.) 229.
(2) 40 Ch. D. 52.
(3) 28 Ch. D. 65.
(4) 57 L. J. (Ch.) 462, 463.
(5) 5th Ed. p. 212.
(6) Law Rep. 1 Eq. 216.
(7) Ibid. 2 Eq. 15.
(8) Law Rep. 9 Eq. 382.

KAY, J.
1889
In re CRITERION GOLD MINING COMPANY.

Association (1); *In re Hereford and South Wales Wagon and Engineering Company* (2); *In re United Stock Exchange* (3) and *In re District Bank of London* (4).]

A. F. Leach, for another shareholder, adopted the same arguments.

Beddall, in reply:—

In most of the cases cited the person to whom costs were allowed was a creditor. The case of a creditor is very different from that of a shareholder, because if a winding-up order is made every creditor gets the benefit of it. Here the Petitioners' debt is undisputed, and rather than break up the company an arrangement has been come to which has been sanctioned by the Court in the liquidation of the syndicate. No creditors oppose, and the appearance of these shareholders was wholly unnecessary.

[He referred to *In re Patent Cocoa Fibre Company* (5)].

KAY, J.:—

I object extremely to have it said that a hard and fast rule has been laid down by the Court as to costs in any case, because I think that in the matter of costs the Court ought to exercise its discretion in each individual case. That is clearly the meaning and intention of the General Order as to costs. In this case the creditors are a company in course of liquidation, which, by leave of the Court, has presented a petition to wind up this company. The petition was formally presented and advertised, and two contributories instructed their solicitors and counsel to oppose that petition. Why they appeared separately I am not told, but I suppose that there has been no concert between them, and that they are entirely separate individuals, both being contributories of the company attacked by this winding-up petition. The Petitioners and the company attacked entered into a negotiation, the result of which was that the Petitioners consented not to press the petition, upon certain terms for security being given for their debt. The debt having been thus secured by

(1) Law Rep. 12 Eq. 59.
(2) Ibid. 17 Eq. 423.
(3) 28 Ch. D. 183.
(4) 35 Ch. D. 576.
(5) 1 Ch. D. 617.

arrangement with the company attacked, the Petitioners consented not to press the petition to a trial. Now they tell the Court frankly what has been done, and ask that the petition may be dismissed upon the terms arranged between them and the company. Thereupon the two contributories claim that the Petitioners should pay their costs, and argue that there is a settled rule that in any such case every creditor and every contributory who appears, whether he appears to oppose the petition, or to support it, is to have his costs; and not only that, but that the rule differs from that which the Court has adopted in the case where the order for a winding-up is actually made, in which case one set of costs is given to contributories, and one set to creditors supporting a petition, out of the estate, and no costs to those who oppose it. Here it is claimed that everybody, whether he supports or opposes, is to have his costs, and not that there should be one set of costs to those who support and one set to those who oppose, but a separate set of costs to each individual. My reason does not at all assent to that. This Court does not set its face against compromises; on the contrary, it does everything in its power to encourage compromises and to discourage unnecessary litigation; and a rule that every creditor and contributory appearing on a petition which is withdrawn by arrangement, whether he has supported or opposed, is to have separate costs, might obviously work injustice. I decline to accept any such rule or to be bound by any hard and fast rule whatsoever in cases of this kind. I do not think that it would be just to allow more costs than would have been allowed if the petition had been dismissed on the merits. If that had been done the creditors who appeared to oppose the petition would have been allowed one set of costs amongst them, the contributories who appeared to oppose would also have been allowed one set of costs, and those who appeared to support would not have been allowed any costs. Surely it is consistent with the law and practice of this Court that when a man has presented a petition for winding up, and afterwards gets his debt satisfied, he should be able to withdraw his petition. Such a rule as I am now asked to adopt would discourage that extremely, and in some cases would make it absolutely necessary that a petitioner should go

KAY, J.
1889.
In re CRITERION GOLD MINING COMPANY.

on with his petition and fight it out, notwithstanding his inclination and the company's inclination to make a compromise, in order that he might have a smaller amount of costs to pay. The true rule is that stated by Mr. Justice *Chitty* in the case of *In re Peckham Tramways Company* (1), in which, referring to his previous decision in the case of *In re North Brazilian Sugar Factories* (2), his Lordship said: "I think that the Court must look narrowly into the circumstances of each case and see whether the parties appearing are justified in appearing separately. In the case of *The North Brazilian Sugar Factories* where the Petitioner withdrew his petition, I gave everybody who appeared separately his costs, whether he appeared as creditor or contributory, and whether he appeared to oppose or support the petition; but my reason for so doing was that in that case the petitioner refused to give any reason for the withdrawal of the petition, so that I could not go into the question as to the rights of the parties." That is a satisfactory statement of the practice by that learned Judge. Nothing appears to have been further from his intention than to lay down the rule that every creditor and every contributory appearing should have a separate set of costs. The Court must have regard to the circumstances of each particular case before it, and make such order as to costs as shall be just in each case. Here the Petitioners have withdrawn their petition and made a satisfactory arrangement. They have got their debt secured, which is equivalent to having it paid. They therefore say, "We withdraw our petition; our debt is satisfied." The two contributories who come to oppose the petition insist that they are entitled to have their costs paid by the Petitioners. As the petition is dismissed there is some ground for giving costs, but the utmost I can give them is one set of costs between the two; I give them no more; and until I am corrected by a superior authority, I shall in each matter coming before me consider the circumstances, and deal with the costs as it seems just in that particular case.

Solicitors: *Albert Myers; Beall & Co.; Slaughter & May.*

(1) 57 L. J. (Ch.) 463. (2) 56 L. T. (N.S.) 229.

C. C. M. D.

DREYFUS *v.* PERUVIAN GUANO COMPANY.

KAY, J.

1889

Feb. 16, 18, 27

[1889 D. 92.]

Practice—Jurisdiction—Discovery—Foreign Action—Discovery in aid.

The Court will not entertain an action for discovery only in aid of proceedings in a foreign Court.

Bent v. *Young* (1) considered and followed.

Crowe v. *Del Rio* (2) observed upon.

THE Plaintiffs in this action by their statement of claim alleged as follows:—(1.) On the 2nd of March, 1886, the Plaintiffs instituted an action against the Defendant company before the Tribunal of Commerce of *Antwerp*, in *Belgium*, claiming payment from the Defendant company of the sum of 1,500,000 francs, representing the proceeds of the realization of the cargoes of guano of three ships arrived and taken and discharged by the Defendant company at *Antwerp*, or any greater or less sum which should be proved to be the proceeds thereof, and interest from the 31st of December, 1883, to the day of payment, together with the costs of suit. (2.) The Defendant company appeared, and the Tribunal, on the 25th of April, 1887, gave judgment, condemning the Defendant company to pay to the Plaintiffs 1,500,000 francs as the value of the cargoes, with interest at 6 per cent. from the 31st of December, 1883, and the costs. (3.) The Defendant company appealed against that judgment to the Court of Appeal of *Brussels*, one of the superior Courts of the kingdom of *Belgium*, and that Court, on the 10th of July, 1888, pronounced judgment, declaring the action to be admissible, and that the Defendant company owed an account to the Plaintiffs of the proceeds of the realization of the cargoes, and annulled the judgment of the Tribunal of Commerce as far as it pronounced forthwith against the Defendant company a condemnation to the payment of 1,500,000 francs and interest, ordered the Defendants to produce, in two months from the service of the judgment, an

(1) 9 Sim. 180. (2) 9 Sim. 185, n.

KAY, J.
1889
DREYFUS
v.
PERUVIAN
GUANO
COMPANY.

account of the realization of the cargoes, reserved to the Plaintiffs the right of disputing such account, condemned the Defendant company to pay to the Plaintiffs on account (*à titre de provision*) 500,000 francs, adjourned the rest of the action, and condemned the Defendant company in the costs of the action. (4.) That judgment was served on the Defendant company on the 21st of August, 1888, but they had not yet produced the account thereby ordered, and in fact refused to do so. (5.) The three cargoes of guano, the property of the Plaintiffs, were sold and the proceeds received by the Defendant company, or their agents, and the Plaintiffs could not ascertain the amount of such proceeds without full discovery thereof by the Defendant company, and in particular of the accounts, books, papers, documents, and writings relating thereto in the Defendant company's possession or power. (6.) Full or sufficient or any discovery could not be had under any procedure in the Belgian Courts; the Defendant company had no residence, place of business, or property within the jurisdiction of those Courts, and any order by such Courts for discovery would be entirely ineffectual. (7.) The discovery sought by the Plaintiffs was material and necessary to the prosecution of their claims and proceedings abroad against the Defendant company; and it was contrary to justice and equity that such discovery should be withheld; and it could not be had except in this Court.

The Plaintiffs accordingly claimed (1) discovery from the Defendant company, by interrogatories or otherwise, of all dealings by the Defendant company with the three cargoes in question, and of the time, place, manner, and other particulars of the sale thereof, and of the price at which they were sold, and of the expenses of such sale, and of the moneys received by the Defendant company in respect thereof; and (2) such further or other order, by way of discovery, and in aid of the Belgian action, as the nature of the case might require.

The Defendant company now moved, under the Rules of the Supreme Court, 1883, Order xxv., r. 4, to strike out the Plaintiffs' statement of claim on the ground that it disclosed no reasonable cause of action, and to have the action dismissed with costs.

Rigby, Q.C., and *Haldane*, for the Defendants, in support of the motion:—

The Court has no jurisdiction to entertain an action for discovery only in aid of proceedings in a foreign Court. The only authority for such a procedure is the very doubtful case of *Crowe* v. *Del Rio and Vallejo* (decided in 1769), referred to by Lord *Redesdale* in his treatise on pleading (1), and there miscalled by him *Crowe and Others* v. *Del Ris and Vallego*. He refers to it, not in the text, but in a note only, and in the brief words, "a discovery has been compelled to aid the jurisdiction of a foreign Court;" and he cites it without approbation. But in *Bent* v. *Young* (2), in the year 1838, *Crowe* v. *Del Rio* was more fully stated (3) and considered, and the late Vice-Chancellor of *England* pointed out that the proceedings in that case were by demurrer to a bill for discovery, and that the demurrer might have been overruled on technical grounds as being a "speaking" demurrer, and not applicable to the relief prayed in the suit. It is clear that the Court will not compel discovery in aid of an inferior Court: *Earl of Derby* v. *Duke of Athol* (4); and in the contemplation of the Court of Chancery every foreign Court is an inferior Court: *Bent* v. *Young* (5). Nor will the Court of Chancery be ancillary to a Court which can itself compel discovery, as, *e.g.*, an Ecclesiastical Court: *Anon.* (6). In *Duckingfield* v. *Nosworthy* (7) Lord Chancellor *Talbot* said he had never known a bill in this Court in aid of jurisdiction in a foreign Court. In *Beames* on Pleas (A.D. 1818) (8) *Crowe* v. *Del Rio* is cited from Lord *Redesdale's* work, but without any approval on the part of the learned writer. *Bent* v. *Young* has been cited in subsequent cases, but has never been dissented from: *Morris* v. *Morris* (9).

[KAY, J., referred to *Paul* v. *Roy* (10) and *Transatlantic Company* v. *Pietroni* (11).]

It is true that in *America*, in the case of *Mitchell* v. *Smith* (12),

(1) Mitf. Pl. 3rd Ed. p. 151; 5th Ed. p. 221.
(2) 9 Sim. 180.
(3) See 9 Sim. 185, n.
(4) 1 Ves. Sen. 202, 205.
(5) 9 Sim. 180, 191.
(6) 2 Ves. Sen. 451.
(7) 2 Eq. Ca. Ab. 246.
(8) Page 252.
(9) 2 Ph. 205.
(10) 15 Beav. 433.
(11) Joh. 604.
(12) 1 Paige's New York Rep. 287.

KAY, J.
1889
DREYFUS
v.
PERUVIAN
GUANO
COMPANY.

it was held that it was the settled practice of the Court of Chancery to give discovery in aid of proceedings in foreign Courts, but that was decided on the authority of *Crowe* v. *Del Rio*, as mentioned by Lord *Redesdale*, and in the year 1828, before *Bent* v. *Young* (1).

[Reference was also made to *Reiner* v. *Marquis of Salisbury* (2) and *In re Henderson* (3)].

Sir *Horace Davey*, Q.C., and *Ingle Joyce*, for the Plaintiffs:—

This action is maintainable. Both reason and convenience are in favour of such a procedure; there is no authority whatever against it, and the only authority which can be cited is entirely in its favour. In *Bent* v. *Young* the Vice-Chancellor of *England* carefully refrained from laying down the proposition that in no case will the Court give discovery in aid of foreign proceedings. The bill in that suit did not allege that the Courts in *Surinam* could not give the discovery which was sought, and the case is (as the text-book writers treat it) an authority only for the proposition that the Court will not give discovery in aid of a defence to a foreign action where no such action has been commenced, and there is no sufficient allegation that the discovery is not obtainable in such action. It is true that in *Bent* v. *Young* the learned Judge said that the Court of Chancery treats every foreign Court as an inferior Court, but it is believed that there is no authority for that statement, which was a mere *dictum*, and not necessary for the decision of the case. On the other hand *Crowe* v. *Del Rio* is a direct authority, and, as appears from the report in 9 Sim. 185, note (the accuracy of which has been now tested by a reference to the Six Clerks' book), that case was not unlike the present case. It is attempted to get rid of *Crowe* v. *Del Rio* by saying that it was a speaking demurrer, but all the text-book writers, the older and the more modern, treat it as an authority to shew that this Court will assist a plaintiff in a proper case, by compelling a person resident in this country to give discovery in aid of proceedings in a foreign Court: see *G. Cooper's* Equity Pleading (4); *Spence's* Equity Jurisdic-

(1) 9 Sim. 180.
(2) 2 Ch. D. 378.
(3) 35 Ch. D. 704; 37 Ch. D. 244.
(4) Ed. 1809, p. 191.

tion (1); *Story's* Equity Jurisprudence (2); *Maddock's* Chancery Practice (3); *Daniell's* Chancery Practice (4). It did not occur to Lord *Redesdale*, writing within twenty years of the decision in *Crowe* v. *Del Rio*, to throw any doubt upon it; and while it has never been impugned in this country, it has been expressly recognised and followed in *America* in *Mitchell* v. *Smith* (5).

Rigby, in reply:—

The text-book writers, who have been cited, do nothing more than re-echo Lord *Redesdale*: they never examined the case of *Crowe* v. *Del Rio* independently, and when they cite it they copy his Lordship's mis-spelling of the names. Mr. *Beames*—not the least authoritative amongst them—cites the case in such a way (6) as to shew that he, at all events, did not desire to add his authority to that of Lord *Redesdale*. If such a jurisdiction as the Plaintiffs contend for exists, it is difficult to understand how so long a period of time can have elapsed during which no instance can be adduced of the jurisdiction having been exercised.

[As to the procedure under Order XXV., he referred to *Burstall* v. *Beyfus* (7) and *Dadswell* v. *Jacobs* (8).]

Feb. 27. KAY, J.:—

The notice of motion in this case seeks to have the statement of claim struck out on the ground that it discloses no reasonable cause of action, and that the action may be dismissed with costs.

The application is founded upon Order XXV., r. 4, an order instituting a new course of proceeding in lieu of demurrers, which it abolishes.

The statement of claim seeks discovery in aid of an action which is pending between the Plaintiffs and Defendants in the kingdom of *Belgium*. The main question is whether the Court has jurisdiction to entertain an action for discovery only in such a case.

(1) Ed. 1849, vol. ii. p. 11.
(2) Vol. ii. p. 712, 13th Ed. vol. ii. p. 821, pl. 1495.
(3) 3rd Ed. vol. i. p. 270.
(4) 6th Ed. ch. xxi. s. 11, p. 1508.
(5) 1 Paige's New York Rep. 287.
(6) Beames on Pleas, p. 252.
(7) 26 Ch. D. 35.
(8) 34 Ch. D. 278.

KAY, J.
1889
DREYFUS
v.
PERUVIAN
GUANO
COMPANY.

In Lord *Redesdale's* Treatise on Pleading (1) the practice is thus stated :—" Where the bill is a bill of discovery merely, it is necessary for the plaintiff to shew by his bill a case in which a Court of Equity will assume a jurisdiction for the mere purpose of compelling a discovery. This jurisdiction is exercised to assist the administration of justice in the prosecution or defence of some other suit, either in the Court itself or in some other Court." In a note it is added :—" A discovery has been compelled to aid the jurisdiction of a foreign Court; *Crowe and others against Del Ris and Vallego*, in Chan. 11th July, 1769."

The case last mentioned has not been reported, but the records have been investigated, and a fuller statement of it is given in the note to *Bent* v. *Young* (2). From that it appears that the real names of the defendants were *Del Rio* and *Vallejo*, who were merchants in *London*, and that the plaintiffs had brought an action at *Seville*, in *Spain*, against merchants there, who they alleged were agents for the defendants, and had by undue practices obtained goods and money upon which the plaintiffs made a claim. The bill charged that the defendants had in their custody or power accounts, letters, &c., from which this would appear, and prayed for discovery. The defendants put in a demurrer stating that they were no parties to the litigation in *Spain*, and also for want of equity, and this demurrer was overruled.

There is no other case to be found in *England* in which a similar bill has been supported. But in *Mitchell* v. *Smith* (3), decided in 1828 in *America*, that case was treated as an authority for such a practice. However, in the later case of *Bent* v. *Young* in 1838, the late Vice-Chancellor of *England* pointed out that the demurrer might have been overruled on technical grounds, because the former part of it was bad as a speaking demurrer, and, so far as it was for want of equity, it did not apply, as no relief was prayed.

The Vice-Chancellor of *England* was evidently of opinion that there was no practice which warranted such a proceeding. He says (4) :—" It seems to me to be singular, considering the vast

(1) 3rd Ed. p. 151.
(2) 9 Sim. 180.
(3) 1 Paige's New York Rep. 287.
(4) 9 Sim. 191.

number of appeals that British subjects as well as foreigners have made, to the Privy Council, in respect of foreign plantations, that no instance can be produced of this jurisdiction having been exercised, except the solitary one in Lord *Redesdale's* book: and it is equally singular if, in his opinion, the case was good law, that he should not have cited it with greater confidence than he has done. In the case of *Earl of Derby* v. *Duke of Athol* (1), Lord *Hardwicke* seems to think it clear that this Court will not compel discovery in favour either of an inferior Court or of a Court which has power, in itself, to compel a discovery. Those two propositions are plainly deducible from the language which his Lordship uses towards the conclusion of his judgment; and I consider that in the contemplation of the Court of Chancery, every foreign Court is an inferior Court. In the case of *Crowe* v. *Del Rio* (which is the only authority to be found on the point now before me), the defendants were compelled to answer by the overruling of the demurrer; and it seems to me that, without entering into the merits of the case, the demurrer was defective in point of mere form, and, therefore, it might have been overruled on that ground. In that case, two grounds of demurrer were assigned. One was the general want of equity; but, as the bill was not filed for relief but for discovery only, that would be no objection. The other ground was that the defendants were not parties to the suit in the foreign Court. That, therefore, was a speaking demurrer; for there was no allegation, on the face of the bill, that they were parties to the suit; and the Lord Chancellor may, very probably, have overruled the demurrer on that ground, without at all entering into the consideration of the question, whether this Court will enforce discovery in aid of proceedings in a foreign Court."

Bent v. *Young* (2) has been referred to in subsequent cases, as for example, *Morris* v. *Morris* (3), *Paul* v. *Roy* (4), and *Transatlantic Company* v. *Pietroni* (5). I cannot find any case in which the doctrine as there stated has been dissented from.

On the other hand Lord *Redesdale's* statement of *Crowe* v. *Del*

(1) 1 Ves. Sen. 202.
(2) 9 Sim. 180.
(3) 2 Ph. 205.
(4) 15 Beav. 433.
(5) Joh. 604.

KAY, J.
1889
DREYFUS
v.
PERUVIAN
GUANO
COMPANY

Rio has been copied into various text-books such as *Beames* on Pleas (1); *G. Cooper* on Equity Pleading (2); *Story's* Equity Jurisprudence (3); *Maddock's* Chancery Practice (4). But in all these, as was pointed out in the argument, it is evident that the writers merely took the statement of the case from Lord *Redesdale's* note without examining the record, for in citing the case they have copied his misspelling of the names of the defendants.

No other case can be found in which Courts of Equity have entertained a bill of this kind for discovery in aid of proceedings in a foreign Court. I am bound therefore to assume that the practice as stated by the Vice-Chancellor of *England* in *Bent* v. *Young* (5) and his explanation of *Crowe* v. *Del Rio* have been adopted and acquiesced in, and in the face of these facts it would be inexpedient to permit such a practice without the authority of an Act of Parliament.

I do not advert to other objections which have been raised peculiar to this particular case, some of which possibly might be removed by amendment. My decision rests upon the simple ground that this proceeding is not in accordance with the practice of the Court, and I therefore direct that the statement of claim be struck out, and the action dismissed with costs.

Solicitors: *G. M. Clements; C. & S. Harrison & Co.*

(1) Pages 66, 252.
(2) Page 191.
(3) Vol. ii. p. 712, pl. 1495.
(4) 3rd Ed. vol. i. p. 270.
(5) 9 Sim. 180.

C. C. M. D.

In re JONES, LLOYD & CO., LIMITED.

NORTH, J.

1889

Feb 9, 11.

Company—Winding-up—Contributory—Payment of Shares in Cash—Set-off of present Debt of Company against Liability to future Calls on Shares—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25 [*Revised Ed. Statutes, vol. xv., p.* 628].

An agreement by a shareholder in a company with the company to set off against future calls on his shares a present liability of the company to pay cash to him, is payment of the calls in cash within the meaning of sect. 25 of the *Companies Act*, 1867.

Kent's Case (1) distinguished.

SUMMONS by the voluntary liquidators of the above company to enforce the payment of a call of £10 per share against *W. F. Jones*, a contributory of the company in respect of 130 shares, and *Anne Diana Jones*, spinster, a contributory in respect of 10 shares.

The company was registered under the *Companies Acts* on the 13th of October, 1881, its object being to acquire the business, assets, and liabilities of brewers and wine and spirit merchants, carried on by a private partnership under the firm of *Jones, Lloyd & Co.* The company was registered without articles of association, and was therefore governed by the regulations contained in Table A. in the first schedule to the *Companies Act*, 1862. The shares were of the nominal amount of £10. *W. F. Jones* and *Anne Diana Jones* subscribed the memorandum of association for 150 shares and 30 shares respectively, and shares were issued to them accordingly. Soon after the registration, the business and assets were handed over to the company, and the business was thenceforth carried on by it; but no agreement, defining the terms upon which the transfer was made, was executed until the 14th of January, 1885. In May, 1884, a call of £5 per share was made, but it was not paid by the Respondents in respect of the shares now in question, though they paid it in respect of some other shares, and they afterwards paid up those shares in full. At the date of the formation of the company the firm consisted of three partners:—*T. F. Hampton*,

(1) 39 Ch. D. 259.

NORTH, J.
1889
In re JONES, LLOYD & CO, LIMITED

William Jones, and *A. J. Brereton*, of whom the two latter were only salaried partners. *William Jones* had also advanced £700 to the firm. Subject to the rights of *William Jones* and *Brereton*, the business, and all the assets and profits thereof, belonged to *Hampton*, and, as between him and the other partners, he was bound to bear all the losses.

W. F. Jones had advanced to *Hampton* or to the firm for the purposes of the business £1300; *Anne Diana Jones* had in the same way advanced £100; and *Sophia Hampton*, spinster, had in the same way advanced £350.

On the 14th of January, 1885, an agreement was executed to which the above-mentioned persons (other than *Brereton*) and the company were parties. The agreement contained recitals of the above-mentioned facts, and it was thereby agreed that *T. F. Hampton* as vendor, with the concurrence of the other persons parties thereto (other than the company), agreed to sell, and the company agreed to purchase, and should be deemed to have respectively sold and purchased as from the 12th of October, 1881, all the property and assets of the firm of *Jones, Lloyd & Co.*, including the goodwill of the firm.

The agreement contained the following clauses:—

3. "The price or consideration for the said sale shall be £7350 (subject as hereinafter provided), and shall be deemed to have been payable to the said *T. F. Hampton* on the 12th of October, 1881, and bear interest as from that date after the rate of £5 per cent. per annum. The said purchase-money of £7350, not having been so far paid, shall be paid forthwith to the said *T. F. Hampton*, subject nevertheless as hereinafter provided."

4. "The several sums of £700, £1300, £100, and £350 (being the several amounts so due from the firm of *Jones, Lloyd, & Co.* or the said *T. F. Hampton* to such several persons as hereinbefore recited) shall be paid out of the said price or sum of £7350, on account of the said *T. F. Hampton*, to the said *William Jones, W. F. Jones, Anne Diana Jones*, and *Sophia Hampton* respectively."

5. "The said several persons shall be entitled to have credit for the sums so payable to them as aforesaid as against and in anticipation of any sums which may be or become due from them

respectively in respect of any calls or payments which they may be liable to pay or to have called up on account of the shares held by them respectively in the said company, and the company shall be entitled by way of payment and satisfaction of such several sums to apply them in such manner as aforesaid in or towards the satisfaction and discharge of such liability as aforesaid. Provided always, that the said persons may respectively require to have the amounts so payable to them applied or credited so as to pay up in full all or any of the shares held by them so far as the amounts shall extend and admit, and that unless they shall so require the same shall be applied and credited rateably towards payment of all such shares."

13. "This agreement shall be submitted for the approval and confirmation of an extraordinary general meeting of the company within one month after the date hereof, and, in case it shall not be thereupon approved and confirmed by such meeting, it shall become and be null and void."

The agreement was afterwards duly approved and confirmed by a general meeting of the company in January, 1885, and was registered under the *Companies Act*, 1867, on the 27th of March, 1885.

130 shares of *W. F. Jones* and 10 shares of *Anne Diana Jones* were registered in the company's books as fully paid up, and certificates were issued to them to that effect, but the sums of £1300 and £100 mentioned in the agreement were not expressly appropriated in the company's books in payment of the shares.

In March, 1886, the company resolved to wind up voluntarily.

G. W. Lawrance, for the liquidators:—

The shares have not been paid for in cash within the meaning of sect. 25 of the *Companies Act*, 1867, and no agreement providing for payment otherwise than in cash has been registered in compliance with that section. *Spargo's Case* (1) does not apply. In order that there may be a payment by set-off equivalent to a payment in cash, there must be a debt presently due and payable on each side. A liability to pay calls not actually made,

(1) Law Rep. 8 Ch. 407.

NORTH, J.
1889
In re JONES, LLOYD & Co, LIMITED.

but which may become due hereafter, cannot be set off against a debt immediately due to the shareholder by the company. That is not a payment "in cash;" it is only an accord and satisfaction: *Kent's Case* (1); *White's Case* (2).

Swinfen Eady, for the shareholders:—

There has been that which is equivalent to payment in cash. If there is a debt immediately due by the company, it is not necessary that calls on the shares should have been actually made. The debt may be set off against the liability to pay future calls, at any rate where, as under Table A, the directors have power to receive from the shareholders money in anticipation of future calls. *Kent's Case* was only a decision that a debt not presently payable by the company could not be set off against calls not yet made. The Court of Appeal did not profess to be overruling *Ferrao's Case* (3), in which it was held that part of a debt actually payable by a company to a shareholder could by agreement be set off against the liability of another shareholder to future calls on his shares, so as to constitute a payment of those shares in cash. The effect of the agreement in the present case was to create a debt immediately payable by the company to the shareholders. *Adamson's Case* (4) is also directly in point. The principle of *Spargo's Case* (5) applies. *In re Barrow-in-Furness and Northern Counties Land and Investment Company* (6) is also in point. Indeed the present case is much stronger in favour of the shareholders. *White's Case* was an entirely different one. There the company never came under any money liability to the shareholders; there was no debt in money which could be the subject of a set-off. As to the £5 call, which was actually made in the present case, there could clearly be a set-off.

G. W. Lawrance, in reply:—

Nothing was done in pursuance of the agreement; the debt was never written off in the company's books against the amount due on the shares.

(1) 39 Ch. D. 259.
(2) 12 Ch. D. 511.
(3) Law Rep. 9 Ch. 355.
(4) Law Rep. 18 Eq. 670.
(5) Ibid. 8 Ch. 407.
(6) 14 Ch. D. 400.

[NORTH, J.:—Can the Respondents be prejudiced by the omission of the company to perform their duty? Suppose the Respondents had paid for their shares in bank notes, and the company had omitted to make an entry of the payment?]

Ferrao's Case (1) is hardly consistent with *Kent's Case* (2).

NORTH, J.:—

I think that, having regard to the construction which the Courts have put on sect. 25 of the *Companies Act*, 1867, these shares have clearly been paid for in cash. [His Lordship stated the facts, and continued:—] The agreement of the 14th of January, 1885, was an agreement as to something which was to be done at once as between the parties, subject only to the approval of the company being given to it. That approval was obtained as soon as it could be, and, when that had been done, there was a present agreement binding the parties. In my opinion, the effect of it was this: *T. F. Hampton*, having a claim against the company for the purchase-money of the business, requested them to pay it to him. It was arranged that the amount of the purchase-money, which had not yet been definitely fixed, should be £7350. He agreed that £1300, part of this purchase-money, which was to be paid to him forthwith, should be employed in crediting the Respondent, *W. F. Jones*, to whom *T. F. Hampton* owed a sum of £1300, with that amount in payment of the amount of his shares in the company, and that £100, further part of the purchase-money, should be credited in the same way to the other Respondent, *Anne Diana Jones*, to whom *T. F. Hampton* owed £100. These sums of £1300 and £100 were by the agreement written off as between the company and *T. F. Hampton* on the one hand, and as between the company and the Respondents on the other hand. In my opinion *Ferrao's Case* applies, and shews that the transaction amounted to a payment for the shares in cash. *Maynard's Case* (3) also is exactly like the present case, or rather it would have been if *T. F. Hampton* had himself agreed to take the shares in question. The principle which governs all these cases was laid down by the Court of Appeal in *Spargo's*

(1) Law Rep 9 Ch 355. (2) 39 Ch. D. 259.
(3) Law Rep 9 Ch. 60.

NORTH, J.
1889
In re JONES, LLOYD & CO., LIMITED.

Case (1), and it appears to me to apply exactly to the present case. In that case Lord Justice *James* said (2): "If a transaction resulted in this, that there was on the one side a *bonâ fide* debt payable in money at once for the purchase of property, and on the other side a *bonâ fide* liability to pay money at once on shares, so that if bank-notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it did appear to me in *Fothergill's Case* (3), and does appear to me now, that this Act of Parliament did not make it necessary that the formality should be gone through of the money being handed over and taken back again; but that if the two demands are set off against each other the shares have been paid for in cash. If it came to this, that there was a debt in money payable immediately by the company to the shareholders, and an equal debt payable immediately by the shareholders to the company, and that each was accepted in full payment of the other, the company could have pleaded payment in an action brought against them, and the shareholder could have pleaded payment in cash in a corresponding action brought by the company against him for calls. Supposing the transaction to be an honest transaction, it would in a Court of Law be sufficient evidence in support of a plea of payment in cash, and it appears to me that it is sufficient for this Court sitting in a winding-up matter." I think *In re Barrow-in-Furness, &c., Company* (4) is to the same effect.

But it is said that in the present case there was not a present liability to pay cash on both sides. Is it necessary that that should be so? In *Maynard's Case* (5) and in *Spargo's Case* it would seem that there was such a present liability on both sides. But in *Ferrao's Case* (6) the whole amount of the shares was not payable immediately, and nevertheless it was held that a debt immediately payable by the company could be set off against calls to be thereafter made on shares, so as to constitute a payment of the shares in cash. The same thing happened in *In re Barrow-in-Furness, &c., Company*. In the present case a call

(1) Law Rep. 8 Ch. 407.
(2) Ibid. 412.
(3) Ibid. 270.
(4) 14 Ch. D. 400.
(5) Law Rep. 9 Ch. 60.
(6) Ibid. 355.

of £5 per share had been made in May, 1884, and the Respondents had not paid it. To that extent there was, therefore, a present liability to pay cash on both sides existing at the date of the agreement of January, 1885, and every ingredient was present to enable the one liability to be set off against the other. That, however, does not get rid of the whole amount due upon the shares. But I think the authorities shew that it is unnecessary to consider whether the amount of the shares had been actually called up or not. In *Adamson's Case* (1) it was held that a sum immediately payable by the company for compensation could be set off against the future liability of a shareholder to pay calls upon shares in respect of which calls had not been made. So far as I know the authority of that case has never been disputed. In *Ex parte Bentley* (2) an agreement was entered into between a company and one of its directors, in consideration of his giving up certain benefits, that he should be credited with a sum of £750 as paid up upon 350 shares taken by him, by crediting him with three-fourths of the amount to be paid up on the shares at the date of the registration of the agreement, and with three-fourths of the amounts to be subsequently from time to time paid by him on the shares until the amounts so credited should amount in the whole to £750. And Mr. Justice *Fry*, on the authority of *Ferrao's Case* (3), though he said that he should have come to a different conclusion independently of authority, held that the sums so credited upon the shares were equivalent to payments in cash. In *White's Case* (4) it was held that shares had not been paid for in cash, because the bargain was that the shareholder, the proprietor of a newspaper, should accept payment in fully paid-up shares for a series of advertisements which he was to insert in his newspaper for the company. There the ground of the decision was, that the company had never come under any liability to pay for the advertisements in cash, and there is nothing in the judgments to shew that an agreement to set off a present liability of the company to pay cash against the future liability to pay calls on the shares would have been invalid. Lord Justice *James*, after stating his view of the con-

(1) Law Rep 18 Eq. 670.
(2) 12 Ch. D. 850.
(3) Law Rep 9 Ch. 355.
(4) 12 Ch. D. 511.

NORTH, J.
1889
In re JONES, LLOYD & Co., LIMITED.

struction of the agreement, and referring to *Spargo's Case* (1), said (2): "Here there was nothing to pay. If there could be no money demand, there never was anything to pay. The bargain was that Mr. *White* should accept payment in shares, and must not look for cash. Therefore there never was that money demand which was capable of being, I do not say set off in the ordinary legal sense, but set off by the parties meeting and agreeing to put debt against debt." And Lord Justice *Brett* said (3): "The question is whether at the moment of the alleged payment here, inasmuch as there was not a payment in cash, there was a transaction such as is described in that judgment" (that is, the judgment in *Spargo's Case*). "There was money due to the company on the shares at that moment by virtue of the Act of Parliament, although that was not the bargain between the parties as to the paid-up shares. Well, if there was at that moment money due from the company to *White*, and then they did at that moment agree to set one against the other, there was a transaction which was equivalent to payment, and which would have been proof of payment, but if at that moment there was no money due to *White*, although there was something else due to him, then the case is not brought within the rule." That is to say, money was due from *White* to the company by virtue of the Act of Parliament because he had agreed to take shares. He was liable to pay money to the company because he had become a shareholder, even though calls had not yet been made on him. And Lord Justice *Cotton* said (4): "All that the decisions amount to is this, that when under such circumstances, that is to say, when there are fully paid-up shares in the name of a man put there in pursuance of an agreement, it shall be considered that the Act of Parliament is satisfied if at the time there was money due by the company to the shareholder which could be satisfied by the calls due on the shares, and that there was an agreement in effect that it should be so satisfied."

I will put a case in regard to which I do not think any doubt could be entertained. Suppose a call is made on shares, and the company have accepted from a shareholder a bill of exchange in

(1) Law Rep. 8 Ch. 407.
(2) 12 Ch. D. 515.
(3) 12 Ch. D. 517.
(4) Ibid. 519.

payment of the amount due on his shares in respect of the call. The company would have no right to an immediate payment of cash during the currency of the bill. But could it be said that a debt immediately due to him by the company could not be set off in satisfaction of his liability in respect of the call? I need not refer in detail to *Kent's Case* (1), because there the Court held that there was not a present agreement, but merely a contract as to something which was to be done *in futuro*. There being nothing immediately due either from the company in respect of their debt, or from the shareholder in respect of calls upon the shares, there was nothing as to which there could be a payment in cash. In my opinion, there was in the case now before me a present agreement that a sum immediately payable by the company to *T. F. Hampton* should be applied in paying up in full the shares of the Respondents, and that, in my opinion, is equivalent to payment of the shares in cash.

Some stress was laid in argument on the fact that no entry was made in the company's books appropriating these sums to the payment of the shares, but, in my opinion, that is not material. Under the agreement, which I hold to have been proved, certificates were issued that the shares in question were fully paid up; and thereupon it became the duty of the company to make the entry in their books; and the shareholders could no more be prejudiced by the omission of the company to do so than if they had omitted to make an entry of an actual payment in cash—a payment in bank-notes or in sovereigns. In my opinion, the sums which the liquidators are now seeking to recover have been already paid in cash, and I must dismiss the summons.

Solicitors for Liquidators: *R. S. Taylor, Son & Humbert.*
Solicitors for Shareholders: *Abbott, Jenkins & Co.*

(1) 39 Ch. D. 259.

W. L. C.

NORTH, J.
1889
Feb. 25, 26.

In re DAVID.
BUCKLEY *v.* ROYAL NATIONAL LIFE BOAT INSTITUTION.

[1888 D. 2283.]

*Charity—Mortmain—Interest in Land—Bonds of Harbour Trustees—Assignment of "Rates, Tolls, Rents, &c."—Bridge Tolls—*9 *Geo.* 2, c. 36 [*Revised Ed. Statutes, vol. ii., p.* 403.]

Trustees were incorporated by a special Act for the purpose of managing a harbour. The Act empowered the trustees to demand certain rates in respect of vessels entering or leaving the harbour, and in respect of goods landed into or discharged from vessels entering the harbour; to levy tolls for the passage over certain bridges; and to lease any of the rates and tolls by the Act authorized at a rent. The trustees were also empowered to borrow for the purposes of the Act moneys, not exceeding a specified sum, "on mortgage of the several tolls, rates, and dues by this Act authorized." The Act provided that the mortgagees might enforce the payment of arrears of interest due to them by the appointment of a receiver.

The trustees borrowed money on the security of bonds for £100 each, by which they assigned to the lender of the money "such proportion of the several rates, tolls, rents, and other moneys arising by virtue of the Act as the said sum of £100 doth or shall bear to the whole sum which is or shall be borrowed upon the credit of the said rates, tolls, rents, and other moneys," to hold to the assignee until the sum of £100, with interest thereon, should be paid:—

Held, that the bonds amounted to an assignment of the bridge tolls specifically; that those tolls constituted an interest in land; and that, consequently, the bonds were within the Act 9 Geo. 2, c. 36, and could not be given to a charity.

Knapp v. *Williams* (1) cannot be considered as overruled by *In re Christmas* (2).

SUMMONS by the surviving trustee of a deed dated the 8th of August, 1882, asking (*inter alia*) for a declaration that a sum of £2000 secured by *Swansea Harbour* bonds (being part of the trust funds subject to the trusts of the deed at the date thereof), was an interest in or a charge or incumbrance affecting or to affect land within the meaning of the Act 9 Geo. 2, c. 36.

By the deed in question, *John David* and his wife appointed certain funds over which they had a power of appointment

(1) 4 Ves. 430, n. (2) 33 Ch. D. 332.

(subject to their own life estate) to trustees, upon trust to pay the income to *Jane Betser* during her life, and after her death upon trust to sell and convert the securities, and to hold the proceeds of sale and conversion upon trust to pay certain sums to certain specified charitable institutions; among which was a sum of £1000 to the *Royal National Life Boat Institution*, and to pay or retain the residue of the proceeds of sale and conversion to or for the Plaintiff for her own use and benefit. The settlors and *Jane Betser* were all dead. At the date of the deed the funds subject to the trusts thereof consisted in part of a sum of £2000 secured by *Swansea Harbour* bonds. These bonds were issued by virtue of the *Swansea Harbour Act*, 1854 (17 & 18 Vict. c. cxxvi.), by the *Swansea Harbour* trustees, who were incorporated by that Act, and were sealed with the corporate seal of the trustees.

One of the bonds, dated the 23rd of January, 1855, was for £100, and by it the trustees, in consideration of £100 paid to their treasurer by *Edward David* and *David David* for the purposes of the Act, did grant and assign unto *Edward David* and *David David*, and the survivor of them, and the executors or administrators of such survivor and their or his assigns, "such proportion of the several rates, tolls, rents, and other moneys arising and accruing by virtue of the said Act as the said sum of £100 doth or shall bear to the whole sum which is or shall be borrowed upon the credit of the said rates, tolls, and rents and other moneys, to hold to the said *E. David* and *D. David* and the survivor of them, and the executors or administrators of such survivor, and their or his assigns, from this day until the said sum of £100, with interest at 5 per cent. per annum, shall be lawfully paid and satisfied, the principal sum to be repaid at the end of seven years from the 1st of January, 1855, the interest thereon to be discharged by payment of the sums respectively expressed in the interest warrants hereunto annexed."

The other bonds were in the same form.

The Act provided that a certain number of persons, who were to be appointed and elected in the manner therein mentioned, should be the trustees for executing the Act, and should be called the "*Swansea Harbour* Trustees," and by that name should be a body corporate, with perpetual succession and a common seal,

NORTH, J.
1889
In re DAVID.
BUCKLEY v. ROYAL NATIONAL LIFE BOAT INSTITUTION.

with power to purchase, take, hold, and dispose of lands and other property for the purposes, but subject to the restrictions, of the Act, and to put the Act in all respects into execution.

The purposes of the Act were the construction and maintenance of certain docks, basins, quays, locks, and other works, and the conservancy of the bay and harbour of *Swansea*. Sect. 43 vested in the trustees all the property of or to which, by virtue of certain Acts repealed by the Act, certain old trustees were seised, possessed, or entitled, subject to any incumbrances affecting the same. Sect. 44 provided that the powers and provisions of the Act 4 & 5 Will. 4, c. 69, in relation to the *Mumbles Lighthouse*, should apply to the trustees, as representing the old trustees. Other sections preserved existing rights and liabilities under the repealed Acts. Sect. 50 provided that all debts due by the old trustees should be paid by the trustees. Sect. 55 incorporated the *Lands Clauses Consolidation Act*, 1845. Sect. 56 empowered the trustees to purchase land by agreement for the purposes of the Act. Sect. 57 incorporated the *Harbours, Docks and Piers Clauses Act*, 1847, except sects. 25 and 26 thereof. Sects. 59 and 60 empowered the trustees to construct certain specified works. Sect. 89 provided that the trustees should maintain the *Mumbles Lighthouse* and keep a light there. By sect. 90: "the trustees shall defray all the costs, charges, and expenses of supporting and maintaining the lighthouse and light in good condition out of the rates or dues granted by this Act, but without prejudice to the provisions of that Act of 4 & 5 Will. 4, authorizing the trustees, in the events therein specified, to collect not exceeding a moiety of the rates or duties therein referred to." Sect. 125 empowered the trustees from time to time to demand and take, in respect of vessels entering or leaving the harbour, the several rates specified in a schedule to the Act; and sects. 126 and 127 conferred similar powers to demand and take rates in respect of goods landed into or discharged from vessels lying in the harbour. Sect. 131 empowered the trustees to demand in respect of all goods passing through a certain lock specified rates. Sect. 136 authorized the trustees to erect and maintain toll-gates upon or adjoining certain bridges, and sect. 137 empowered them to demand certain tolls in respect of vehicles, beasts, and foot

passengers passing over the bridges. Sect. 152 empowered the trustees "to lease any of the rates, dues, and tolls by this Act authorized, at such rents and upon such terms and conditions as are agreed upon between the trustees and the persons taking the same, provided that no such lease be granted for longer than three years."

Sect. 99 empowered the trustees, for the purpose of enabling them to construct the works authorized by the Act, to borrow any sum not exceeding £80,000 "on mortgage of the several tolls, rates and dues by this Act authorized." Sect. 102 provided that the trustees should "set apart annually out of the rates, dues, and tolls, as a sinking fund, to be applied in paying off the principal sums from time to time secured on mortgage," a specified amount. By sect. 104 "the mortgagees under the recited Acts and this Act respectively may enforce the payment of the arrears of interest due to them by the appointment of a receiver, and the amount of debt to authorize a requisition for a receiver shall be £5000." By sect. 108 all the moneys of the old trustees at the commencement of the Act, and all rates, dues, and other sums of money received by the new trustees were to be paid to the credit of the "*Swansea Harbour* Fund." By sect. 110 "the moneys from time to time carried to the credit of the *Swansea Harbour* Fund shall be applied, first, in paying the interest on moneys borrowed under the recited Acts and this Act; secondly, in maintaining and regulating the harbour and the navigation thereof; thirdly, in payment of certain rent-charges secured under the Act; fourthly, in payment of the sums by this Act required to be set apart to form a sinking fund; and the surplus, if any, shall be applied for such of the purposes of this Act as the trustees from time to time think fit." The Act did not authorize the trustees to mortgage any land belonging to them.

The Defendants to the summons were the charities to which benefits were given by the deed. They were not authorized to hold land.

Everitt, Q.C., and *G. E. Cruickshank*, for the summons:—

The lighthouse dues constitute an interest in land: *Attorney-*

NORTH, J.
1889
In re DAVID.
BUCKLEY v. ROYAL NATIONAL LIFE BOAT INSTITUTION.

General v. *Jones* (1); and so also do the bridge tolls, and lock tolls: *In re Christmas* (2). These dues and tolls are specifically assigned by the bonds.

Vaughan Hawkins, and *Dibdin*, for the charities:—

1. The bonds do not create a charge on any specific property of the trustees; the charge is only on the undertaking of the harbour as a going concern. The bondholder is entitled to nothing more than a share of a fund which arises in the carrying out of a public undertaking, which undertaking cannot be disintegrated. The bond will never develope into a security on any specific property of the trustees: *Gardner* v. *London, Chatham and Dover Railway Company* (3); *Attree* v. *Hawe* (4). The bond, therefore, creates no interest in land, though the sources which feed the fund may consist in part of real estate. The security is only upon a share of the *Swansea Harbour* Fund. If a receiver were appointed under sect. 104, he would not be entitled to receive any tolls or rent of land; he could only receive a proportion of a gross fund. He would stand in the position of a treasurer or cashier, and would not displace the officers of the corporation in the receipt of the tolls and dues: *Walker* v. *Milne* (5); *Potts* v. *Warwick and Birmingham Canal Navigation Company* (6); *Jervis* v. *Lawrence* (7); *Seton* on Decrees (8).

2. If the bonds do create a security on the specific tolls and dues, still no interest in land is charged. The lighthouse dues are not connected with the lighthouse itself, as was the case in *Attorney-General* v. *Jones*, and sect. 99 empowers the trustees to borrow money on mortgage of the tolls, &c., "by this Act authorized." The lighthouse dues were not authorized by this Act, but by a prior Act; this Act only transfers them to the new trustees.

The bridge and lock tolls are not an interest in land; they are not attached to a house or land. Passage tolls are divided by the old writers into "tolls thorough" and "tolls traverse."

(1) 1 Mac. & G. 574, 589.
(2) 33 Ch. D. 332.
(3) Law Rep. 2 Ch. 201.
(4) 9 Ch. D. 337.
(5) 11 Beav. 507.
(6) Kay, 142.
(7) 22 Ch. D. 202.
(8) 4th Ed. vol. i., pp. 422, 423.

"Toll thorough is a sum demanded for a passage through a highway, or for a passage over a ferry, bridge, &c. . . . Toll traverse is a sum demanded for passage over what was at the time of granting the toll the private soil of another;" *Comyns'* Dig. (1); *Heshord* v. *Wills* (2); *Joshua Williams* on Rights of Common (3). The former kind of toll (of which kind the tolls now in question are) is not an interest in land. In *Knapp* v. *Williams* (4) it was, no doubt, held that a mortgage of turnpike tolls is within the *Mortmain Act*. But the authority of that case is much shaken, if not destroyed, by the observations of Lords Justices *Cotton* and *Lindley* in *In re Christmas* (5); and from what Lord *St. Leonards* said in *Myers* v. *Perigal* (6) it appears that the bonds in question in *Knapp* v. *Williams* contained an actual assignment of real estate.

[NORTH, J., referred to *Howse* v. *Chapman* (7).]

NORTH, J.:—

The question is, whether a sum of £2000, secured by *Swansea Harbour* bonds, is pure or impure personalty.

The *Swansea Harbour Act* of 1854 is one of a very common description. By it certain powers are given to a body of trustees, who are formed into a corporation, for the purpose of managing the harbour, raising money by levying rates, dues and tolls, and borrowing money in the way provided by the Act.

The sum now in question was borrowed under the power conferred by sect. 99 of the Act, which enables the trustees for the purposes mentioned in that section from time to time "to borrow any sum not exceeding £80,000 on mortgage of the several tolls, rates, and dues by this Act authorized." [His Lordship referred to sects. 125, 126, 127, 136, 137, and 147 of the Act, and to the form of the bonds, and continued:—] In addition to the property which I have mentioned the trustees have under the Act certain portions of land vested in them upon which they have erected docks and warehouses. They have powers, express or

(1) 5th Ed. vol. vii., pp. 457–9.
(2) 1 Sid. 454.
(3) Page 299.
(4) 4 Ves. 430, n.
(5) 33 Ch. D. 340, 341, 345.
(6) 2 D. M. & G. 599, 619.
(7) 4 Ves. 542.

NORTH, J.
1889
In re DAVID BUCKLEY *v.* ROYAL NATIONAL LIFE BOAT INSTITUTION.

implied, by virtue of which they may let the land and receive rents for it, but I do not find any power in the Act to mortgage those rents. It is true that the security expressly covers "rates, tolls, rents and other moneys," but there are some rents upon which, I think, it is clear that a mortgage could be given, because, there being power to charge the tolls, rates, and dues, and also power to let those tolls, rates, and dues to a lessee, I think the persons who had power to mortgage the thing which may be let had power also to mortgage the rent issuing out of that thing when let. There are, therefore, rents referred to in the Act which are capable of satisfying a legal mortgage of "rents," without holding that the Act gives the trustees power to mortgage the rent of land vested in them, which I think it does not.

Now, before referring to the particular kinds of property, I will deal with the general argument of Mr. *Vaughan Hawkins*. He says that, according to the principle of *Gardner* v. *London, Chatham and Dover Railway Company* (1), this bond was in reality a mortgage of the whole undertaking of the trustees, and not of the various things which go to make it up; that by virtue of the mortgage the mortgagee cannot touch any of the things comprised in the security, but has only the right to receive the growing fruit which ripens on the tree, and to receive it by the hands of a receiver appointed to receive from the treasurer of the corporation the surplus income remaining, after all the prior purposes to which the income has to be applied have been satisfied. I do not think the present case comes within that class of cases. I do not think it is a mortgage of the undertaking—of the fruit or the surplus income; it is a mortgage of the particular things expressed to be comprised in the security. If this general argument could prevail I cannot understand why the learned counsel who argued in *In re Christmas* (2) did not use it, and why that case was not decided upon that general principle, instead of upon a consideration of the details of the particular property comprised in the security. I do not say that that is conclusive, for the point might have been overlooked; but I do not think it was, and until I have some authority for applying *Gardner* v. *London, Chatham and Dover Railway Company* to

(1) Law Rep. 2 Ch. 201. (2) 33 Ch. D. 332.

such a case as the present I cannot do so. I do not see that any mischief would arise from taking that view, but it does not seem to me to be in accordance with the law as it stands at present.

It is, I think, very unfortunate that in the Act recently passed relating to mortmain (51 & 52 Vict. c. 42), the various questions which are constantly arising in the Courts as to what is and what is not pure personalty should not have been settled once for all. However, they have not been settled, and we are left, so far as that Act goes, very much where we were before.

The next question is, whether the specific things upon which the security is created are obnoxious to the provisions of the *Mortmain Act*. As regards the harbour tolls—the tolls on ships entering and leaving the harbour—and the tolls, rates, or dues on goods shipped and unshipped, I do not see that they in any way savour of real estate. I think there are many authorities to that effect, but it is enough to say that such dues come exactly within the decision of the Court of Appeal in *In re Christmas* (1).

Then there are the bridge tolls, and probably the tolls for passage through the lock will stand in the same position. As regards these tolls, it seems to me that *Knapp* v. *Williams* (2) governs the present case, and that it is not open to me to give a decision at variance with that case. Doubts have been thrown upon that case from time to time, but it is a decision of the Lord Chancellor, and it is not in my power to overrule it. The report of that case in 4 *Vesey*, 430, seems to me perfectly clear. The statement is that "the security was taken upon the tolls simply; not including the toll-houses and gates." That is very explicit and clear. "Toll" is a very intelligible word, even if the subsequent words "not including the toll-houses and gates" had been omitted. Then in *Howse* v. *Chapman* (3), though I do not find that any argument upon the point is given in the report, a declaration was made that bonds of the commissioners of a turnpike road were not pure personalty. There are later cases to the same effect, which I do not think it necessary to follow out at present. In *Myers* v. *Perigal* (4) *Knapp* v. *Williams* was incidentally considered by Lord *St. Leonards*; (I say incidentally, because

(1) 33 Ch. D. 332.
(2) 4 Ves. 430, n.
(3) 4 Ves. 542.
(4) 2 D. M. & G. 599.

NORTH, J.
1889
In re DAVID. BUCKLEY v. ROYAL NATIONAL LIFE BOAT INSTITUTION.

Myers v. *Perigal* (1) itself, relating to shares in a joint stock bank, was a totally different case;) but Lord *St. Leonards* said this (2): "Some of the authorities cited have gone considerable lengths. as for instance the case of *Knapp* v. *Williams* (3), where there was the bequest of sums secured by a mortgage of turnpike tolls; but in that case it is to be observed there was an actual assignment of the real property on which the tolls were secured: there was therefore something more than savouring of realty." Now, in the report of *Knapp* v. *Williams*, nothing of the sort is to be observed. It has, indeed, been suggested that Lord *St. Leonards* may have had some sources of information which the reporter had not, but, even if he had, I do not know what he can have meant by the phrase "an actual assignment of the real property on which the tolls were secured." I do not know on what "real property" the turnpike tolls "were secured." Therefore, that observation does not give me any assistance. Then the matter came before the Court of Appeal in *In re Christmas* (4), and I have looked anxiously at their judgments to see if I could find something to assist me in coming to a definite and decisive conclusion on the point. But I cannot find that they expressed any disagreement with *Knapp* v. *Williams*. They pointed out that it was distinguishable from the case before them, and so no doubt it is. Lord Justice *Cotton* said (5): "In that case" (that is *Knapp* v. *Williams*), "he (*i.e.* Lord *Loughborough*) considered that tolls for the use of a turnpike road, and for the use of wha was certainly vested in the trustees, of turnpikes and toll-houses, might be considered as so far connected with the land as to be an incorporeal hereditament within the statute." Lord Justice *Cotton* did not express any disapproval of that, but he added: "Therefore that decision does not apply to the present case, where the duties are of a very different nature," and he points out what the differences were. In my opinion *Knapp* v. *Williams* does not apply to the harbour dues in the present case, which, I think, are governed by the decision in *In re Christmas*. But that decision does not affect the bridge tolls, as to which, in my opinion, I am bound to follow *Knapp* v. *Williams*. It is

(1) 2 D. M. & G. 599.
(2) Ibid. 619.
(3) 4 Ves. 430 n.
(4) 33 Ch. D. 332.
(5) 33 Ch. D. 341.

true that in that case the tolls were turnpike tolls, while in the present case they are bridge tolls, but I can see no distinction between the two cases which will enable me to say that the law as to the one is not the law as to the other. Having given careful consideration also to the judgments of Lord Justice *Lindley* and Lord Justice *Lopes* in *In re Christmas* (1), I do not feel that it is in my power to decide the present case differently from *Knapp* v. *Williams* (2) without overruling that case, which of course I cannot do. I come therefore to the conclusion that with respect to the bridge tolls there is a charge on land which makes the bonds impure personalty.

With regard to the lighthouse dues, that is a very interesting point, and I am not satisfied that the case is in substance distinguishable from *Attorney-General* v. *Jones* (3). But it is not necessary for me to express any definite opinion upon this point, because my decision with respect to the bridge tolls is enough to govern the case.

I should add with regard to the bridge tolls, that in *Attree* v. *Hawe* (4), Lord Justice *James*, who delivered the judgment of the Court, recognised the difference which may well exist between such charges and charges upon the general property of a company, for he said (5): "It is possible to conceive the case of a company, the owner of a market, a port, or other franchise, with nothing to do but to receive tolls and pay its creditors, just as in the case of a turnpike or bridge the whole tolls may be taken by the creditors, leaving the road or bridge to be repaired by the parish or county. But with a railway company this is impossible," and he went on to point out why. This distinction was the ground of the decision in *Attree* v. *Hawe*, and also of that in *Gardner* v. *London, Chatham, and Dover Railway Company* (6). I must, therefore, make a declaration that the £2000 secured by the harbour bonds is impure personalty.

Solicitors: *Murray, Hutchins, & Stirling; Clayton, Sons, & Fargus.*

(1) 33 Ch. D. 332.
(2) 4 Ves. 430, n.
(3) 1 Mac. & G. 574.
(4) 9 Ch. D. 337.
(5) Ibid. 350.
(6) Law Rep. 2 Ch. 201.

W. L. C.

STIRLING, J.

1889
Feb. 2, 9

In re DANGAR'S TRUSTS.

Payments of Legacies into Court to the same Account—Erroneous Order made in dealing with the Fund—Loss of Income to Legatee—Negligence of Solicitor—Liability of Solicitor to make good Deficiency, and for the Costs.

Trustees paid into Court, under the *Trustee Relief Act*, a legacy of £500 bequeathed to *D.*, an infant, to the credit of an account in the matter of the trusts of the will of the testator. Two years afterwards they transferred into Court to the same account a sum of Consols, representing a legacy of £7000 bequeathed to *M.*, and after her death to her children, and on both occasions the trustees in the petitions stated that the office of *N.*, their solicitor, was to be the place for the service of any notice in reference to the funds. A year after the transfer of the Consols a petition was presented by *M.*, by her next friend, a solicitor, and by the trustees, for the purpose of dealing with the Consols, and the solicitors on the record for the Petitioners were the firm of whom *N.* was a member, and the office of *N.* was to be the place where any notice was to be served relating to the trust fund. The petition set forth what had been done in respect of the Consols and other matters. An order was made in reference to the Consols and dividends; but in drawing it up an error occurred by including in it the whole of the fund standing to the credit of the account, and the future dividends were, as ordered, paid to *M.* during her life.

D. had suffered loss by payments wrongly made to *M.* (now deceased), and she, on attaining majority, presented a petition asking that the estate of *M.* might be made primarily liable for the loss which she had suffered, and that *N.* might be made liable for any deficiency:—

Held, that *N.*, as officer of the Court, had been guilty of negligence in not seeing that all the facts relating to the funds were brought before the Court when the order was made, and that he must, after *D.* had exhausted the estate of *M.*, make good any deficiency, and pay the costs of the petition.

PETITION.

William Dangar, who died in April, 1868, by his will, and a codicil thereto made shortly before his death, after appointing trustees and executors, and so far as it is necessary to state, gave two legacies, one of £500 in trust for the benefit of *Maud Marion Dangar* (the Petitioner), at that time an infant of little more than a year old; and the other of £7000 (£5000 by the will and £2000 by the codicil), free of legacy duty, in trust for the benefit of *Louisa Dangar*, afterwards *Louisa Mitchell*, for her life for her separate use, and after her death to divide it amongst her children

at the age of twenty-one years, or marriage as to daughters. In November, 1868, the trustees and executors made an affidavit, and therein stated that they were desirous, for reasons therein mentioned, of paying into Court, under the *Trustee Act*, the £500 given to the Petitioner. Paragraph 9 of the affidavit said: "We appoint the office of Mr. *Albert Ommanney Nelson*, situate at No. 6, *Godliman Street, Doctors' Commons*, in the city of *London*, our solicitor in this matter, as the place where we are to be served with any petition or any notice of any proceeding or order of this honourable Court relating to the said trust fund." In 1870, about two years afterwards, the trustees made another affidavit, and therein stated, *inter alia*, that they had invested the £7000 legacy in the purchase of £7427 1*s*. consols, and were desirous of transferring that sum into Court, and that affidavit contained a paragraph identical in terms with paragraph 9 of the previous affidavit. Both funds, the £500 and the £7427 1*s*. Consols, were paid in to the credit of the same account, intituled "In the matter of the trusts of the will and codicil of *William Dangar*, deceased," and they were not separated in any way. That having been done a petition was presented in 1871 for the purpose of dealing with the £7000 legacy, and it was presented by *Louisa Mitchell*, the tenant for life, described as the wife of *John Mitchell*, out of the jurisdiction, by *Charles George Toller*, of *Doctors' Commons*, in the city of *London*, her next friend, and by the trustees of the will and codicil. The petition was not served upon any one. The petition stated the will and codicil, the investment of the £7000 in Consols, and the affidavit of the trustees made in 1870, and then, after stating that they had transferred into the name of the Accountant-General to the credit of the account intituled "In the matter of the trusts of the will and codicil of *William Dangar*, deceased," the sum of £7408 17*s*. 6*d*. Consols, being the balance of £7427 1*s*. Consols, after having sold out therefrom sufficient to realize the costs of the transfer into Court, they said: "There is now standing to the credit of the same account the sum of £—— Three per cent. Consolidated Bank Annuities, being the result of the investment of £116 15*s*. 8*d*. cash, a half-year's dividend which accrued due on the said first mentioned sum of Bank Annuities on the 5th day of July, 1871."

STIRLING, J.
1889
In re DANGAR'S TRUSTS

The petition also stated the position of matters in reference to the trustees, and to the husband of the Petitioner *Louisa Mitchell*, *John Mitchell*, who was out of the jurisdiction, and there was a statement that "the office of your Petitioner's solicitor, Mr. *Albert Ommanney Nelson*, is the place where your Petitioner may be served with any petition or summons, or notice of any proceeding or order of this honourable Court relating to the said trust fund." On the face of the petition Mr. *Albert Ommanney Nelson*, who had acted as the solicitor of the trustees on the former occasion, again appeared as the solicitor on the record of the Petitioners in that matter. The Petitioners asked that the £—— sum of Consols might be transferred to an account to be intituled "In the matter of the trust of a legacy of £7000 bequeathed by the will and codicil of *William Dangar*, deceased," and that the dividends might be paid to the Petitioner, *Louisa Mitchell*, during her life for her sole and separate use. The explanation of the omission of the total sum of Consols upon the brief which was produced in Court was that the actual amount could not be ascertained owing to the last dividend being uninvested, and it also appeared from the same brief that counsel was instructed to mention the matter to the Judge. The order was made in the usual manner, with a direction that the certificate should be produced to the Registrar. There were other indications on the brief that the matter was not lost sight of, for the Registrar had pencilled out the form of the order upon the brief, and added the words "Produce the legacy duty receipt, and produce further certificate of fund." The order was drawn up. It contained an entry of the evidence and of the Accountant-General's certificate, and stated that £8110 0*s.* 7*d.* Bank 3 per cent. Annuities remained on the credit of "In the matter of the trusts of the will and codicil of *William Dangar*, deceased," and ordered the payment of the future dividends to *Louisa Mitchell* for her separate use. The order was carried into effect, and the whole fund transferred to the credit of the £7000 legacy, and the dividends thereon were paid to *Louisa Mitchell* during her life. *John Mitchell* was the legal personal representative of *Louisa Mitchell*, who had recently died. *Maud Marion Dangar*, having attained the age of twenty-one years, presented this petition,

making *John Mitchell*, the beneficiaries of the £7000 legacy, the trustees, the Paymaster-General, and Mr. *Albert Ommanney Nelson*, Respondents, and asking that she might be paid out of the fund in Court a sum which would represent the legacy of £500, and the dividends which had accrued thereon, and that the estate of *Louisa Mitchell* and Mr. *Albert Ommanney Nelson* might be ordered to make good any deficiency which might arise from the funds and dividends having been paid to the wrong person.

Henry Terrell, for the Petitioner:—

It is submitted that the solicitor through whose negligence the order of 1871 was erroneously made is liable to make good the loss of interest which has resulted to the Petitioner. The case is covered by the decision in *Re Spencer* (1). There on a petition an erroneous order was made through the negligence of the persons named, and it was held that they were jointly and severally liable. The present case is much clearer. If Mr. *Nelson* had taken the trouble to look at the affidavit which was prepared in his office and filed at the time the order was made, he would have seen that the sum stated in the order included the legacy of £500, and an accumulation of dividends thereon. If he had acted properly the mistake would not have taken place. The Petitioner is entitled to an order against Mr. *Nelson* directing him to pay the sums which she claims, whatever his rights may be against other persons. It was necessary to make the Paymaster-General a Respondent in order that he might be represented by the Solicitor to the Treasury, but it is not alleged that there was any default on his part, and the Petitioner does not claim anything against him.

C. Lyttelton Chubb, for the present trustees; the beneficiaries of the larger legacy; and the legal personal representative of *Louisa Mitchell*, said that he did not dispute that the legal personal representative was liable primarily to make good the loss, and that he would be willing to account for the assets which he had received from *Louisa Mitchell's* estate, but he submitted that Mr. *Nelson* was primarily liable for the costs which had been

(1) 18 W. R. 240; and more fully reported in 21 L. T. (N.S.) 808.

STIRLING, J. 1889 *In re* DANGAR'S TRUSTS

incurred through his neglect: *Re Spencer* (1), and, therefore, the costs of the Respondents should be provided for.

Ingle Joyce, for the Paymaster-General, who had been served with notice of the petition under the provisions of the *Court of Chancery (Funds) Act*, 1872 (35 & 36 Vict. c. 44), said that the erroneous order was made in the time of the Accountant-General, but as no claim was pressed against the Paymaster-General, there having been no negligence on the part of himself or any of his officials, he would not ask for any costs which had been incurred on this petition.

W. Pearson, Q.C., and *W. C. Druce*, for the solicitor:—

The original trustees or their representatives, and Mr. *Charles George Toller* should have been brought before the Court. It is submitted that Mr. *Nelson* acted as agent for Mr. *Toller*, who was the principal solicitor on the petition of *Louisa Mitchell* and the trustees, which was presented in 1871, and the Petitioner cannot make him liable in the absence of the persons who employed him as agent and who are primarily liable, except perhaps as to costs: *Re Spencer* (2). No relief is asked against the representative of *Louisa Mitchell*, whose estate is liable for the moneys wrongly paid to her, but an attempt is made to obtain an order against Mr. *Nelson* solely, without having recourse to the persons who paid the money into Court, and afterwards dealt with it. Mr. *Nelson* very much regrets the mistake which was made, but he contends that he is under no liability to make good the loss suffered by the Petitioner. This is not a proceeding under the summary jurisdiction of the Court against a solicitor by his client—the person who employed him and to whom he is liable if he did something wrong—but a petition to make Mr. *Nelson* liable for acts done by somebody else—an application by a third party asking that he as an officer of the Court may be made liable for the acts of the solicitor for whom he acted. Questions arise as to the jurisdiction of the Court, having regard to the form of the petition, and the fact that certain persons are not before the Court, and, further, whether there was such miscon-

(1) 18 W. R. 240. (2) 21 L. T. (N.S.) 808.

duct on the part of a solicitor, as an officer of the Court, as to make him liable to third persons. Mr. Justice *Pearson* held that it was the duty of a solicitor having the carriage of an order to request the Paymaster-General to invest moneys, and if he neglects his duty, and loss of interest is suffered he is liable to make it good, and the order can be made on a summons in an action: *Batten* v. *Wedgwood Coal and Iron Company* (1), but in *MacDougall* v. *Knight* (2) the question how far the Court ought to follow that decision, on the question of jurisdiction to make a solicitor answerable for loss arising from negligence of duty, was not entered into, and no opinion was expressed upon it, and Lord Justice *Cotton* said that he must not be considered as assenting to the view expressed by Mr. Justice *Pearson* that under the summary jurisdiction of the Court a solicitor may be made liable to a third person. In no point of view is Mr. *Nelson* personally liable. The managing clerk who attended to the matter assumed that the form of the order as prepared by the Registrar was correct, and the error would not have occurred if the order had not been in that form. That was not such gross misconduct as entitled a third person—not a client at all—to ask the Court to make the solicitor liable. There was actual misconduct in *Re Spencer* (3), from which this case is free. That case is not an authority to shew that the Court has jurisdiction to make an order summarily against a solicitor for something which he has done for another person, and in *Batten* v. *Wedgwood Coal and Iron Company* it was not cited.

H. Terrell, in reply, referred to *Ezart* v. *Lister* (4), and submitted that as to the liability of the solicitor the case of *Batten* v. *Wedgwood Coal and Iron Company* was distinctly in the Petitioner's favour.

Ingle Joyce mentioned a recent case of *Slater* v. *Slater* (5).

W. Pearson:—What was stated by Lord *Langdale* in *Ezart* v. *Lister* was *obiter dictum*, and could not stand against what was said

(1) 31 Ch. D. 346.
(2) W. N. (1887) p. 68.
(3) 21 L. T. (N.S.) 808.
(4) 5 Beav. 585.
(5) 58 L. T. (N.S.) 149.

STIRLING, J. 1889 *In re* DANGAR'S TRUSTS.

by Lord Justice *Cotton* in *MacDougall* v. *Knight* (1). There was nothing said about jurisdiction in *Slater* v. *Slater* (2).

STIRLING, J.:—

This petition has raised a question which happily, under the practice which prevailed down to a recent time, was rare, and I hope such a question may continue to be rare under the present practice. It is as to the liability of various persons by reason of a fund in Court having been improperly dealt with. [His Lordship then stated the facts as above set forth, and having said that from what appeared upon the occasion of the presentation of the petition in 1871 the Petitioner's solicitors must be taken to have been cognizant of everything; the state of the funds, the fact that the whole of the funds standing to the credit of the trusts of the will of *William Dangar* did not represent exclusively the legacy of £7000, but partly the legacy of £500; and that the omission of the total sum of Consols seemed to have afforded a subject of remark, and no doubt struck the eye of the Judge, of his secretary, and of the counsel who brought the matter before the Court, continued:—] The order made upon *Louisa Mitchell's* petition was acted upon. The whole of the fund was transferred to the credit of the £7000 legacy account, and the dividends were paid to her during her life. The matter has rested there until the present Petitioner attained twenty-one years of age, and she now requires payment to her of the legacy of £500 and the dividends which have accrued due thereon, and asks for such relief against the Respondents, or some or one of them, as she may be entitled to. Before going further I wish to point out that Mr. *Albert Ommanney Nelson*, by acting as the solicitor for the trustees in the matter of the payment into Court and of the petition presented by them and Mrs. *Mitchell*, took upon himself the duty of bringing before the Court all the facts of which it would be necessary or proper that the Court should be informed upon such an occasion; and it must be added that he neglected to fulfil that duty. There is no charge of anything approaching to fraud, or anything beyond the simplest neglect, against him or anybody else. But though it is only with neglect

(1) W. N. (1887) p. 68. (2) 58 L. T. (N.S.) 149.

that Mr. *Albert Ommanney Nelson* is charged, yet I am bound to say that he did not fulfil the duty which he undertook to the Court by allowing his name to appear as solicitor of the trustees upon the affidavits. Then in the next place he appeared as solicitor upon the petition of 1871, which was presented by him as the solicitor both of *Louisa Mitchell*, the tenant for life, and of the trustees, and on that occasion it was his duty as solicitor of the trustees to see that the fact was brought to the notice of the Court that the moneys which it was proposed to deal with consisted of two funds, the £7000 and the £500, but the petition was framed with a total disregard to that, and there was not even a suggestion of the fact, which ought to have been stated upon the face of the petition, that the fund consisted of the two distinct legacies. But further than that the petition contained at least one inaccurate statement, viz., the statement that the sum of £116 15*s.* 8*d.* cash represented "a half year's dividend which accrued due on the said first mentioned sum of Bank Annuities on the 5th of July, 1871." Now the first mentioned sum of Bank Annuities was the sum of £7408 17*s.* 6*d.* which represented a part only, and not the whole of the fund which, prior to the accruing of that dividend, stood to the credit of the matter.

There was therefore a distinct representation that the whole of the cash was the result of one dividend, which accrued upon the £7000 legacy. Further than that, the Registrar, in drawing up the order, must have been furnished with the certificate shewing that the sum of £8110 0*s.* 7*d.* was the sum standing to the credit of the account of the trusts of the will of *William Dangar*, deceased, and, having regard to the form of the petition, there was a representation to the Court and to the Registrar that the whole sum of £8110 0*s.* 7*d.* was a fund which had been properly appropriated, in one way or another, in satisfaction of the legacy of £7000 bequeathed by the will and codicil. That representation was not in accordance with the fact, for only part of that fund represented that legacy. It used to be said that in dealing with a petition of that kind there was a four-fold guarantee that nothing would go wrong, *i.e.*, the matter was brought before the Judge, read by his secretary, stated by counsel, and finally, the Registrar looked into it. By reason of the sum being stated

STIRLING, J. 1889 *In re* DANGAR'S TRUSTS.

in blank in this case three of those safeguards fell through on that occasion. The matter was not brought to the notice of the Judge, nor of his secretary, nor of counsel, otherwise it could hardly have escaped detection that the difference between £8110 0*s.* 7*d.* and £7408 17*s.* 6*d.* Consols did not represent £116 15*s.* 8*d.* cash. Upon these facts the question is, who is liable to the Petitioner for the loss occasioned to her by the erroneous order having been made. The Respondents to the present petition, which is intituled not merely in the matter of the *Trustee Act* and of the trusts of the will, but also in the matter of the solicitor, Mr. *Albert Ommanney Nelson*, are several: first of all, the present trustees of the will, and the beneficiaries who are entitled to the legacy of £7000, which was subject to the life interest of *Louisa Mitchell*; next, the legal personal representative of *Louisa Mitchell*; then the Paymaster-General, and then Mr. *Albert Ommanney Nelson*. As to the first-named Respondents, the beneficiaries who are entitled to the legacy of £7000, they, by their counsel, have offered no opposition to the payment to the Petitioner of so much of the fund in Court as represented the £500 legacy, but they ask that their costs of appearing on the petition may be provided for before the fund is carried over as they have not been guilty of any negligence. As regards the legal personal representative of *Louisa Mitchell* he is, I understand, willing to account for the sums which have come to his hands from her estate, but there will probably be only a small amount that will come from that source. As regards the Paymaster-General, the petition is unfounded. I cannot find that he or his officials have been guilty of any neglect whatever. It was the Accountant-General, in those years, as the order was made before the recent Act of Parliament was passed, but, treating him as the Paymaster-General, he simply did what he was ordered to do: furnish a correct certificate upon the application made to him, and obey the order of the Court which dealt with the whole of the fund. It does not seem to me that he can be held liable in any way: therefore the petition fails as against him, but as he asks for no costs of appearing on this petition, it is not necessary to say anything more about him. Then comes the question whether the solicitor, Mr. *Albert Ommanney Nelson*,

is liable. The cases in which a solicitor has been held liable have happily been rare, but not so few as was represented in the course of the arguments. The first case which I think it necessary to refer to is that of *Ezart* v. *Lister* (1). That was an administration suit, and in it provision was made for the payment of an annuity by setting apart a sum of £666 6*s.* 8*d.* Consols. By the decree on further directions in 1810 funds in Court were apportioned, and the residue was ordered to be paid to *William Goodill*, who was entitled, subject to a life interest, to the sum so set apart. It was afterwards ascertained that the plaintiffs, the trustees, had a charge of £263 against the assets for expenses incurred, and by an order made in 1815 it was referred to the Master to tax all parties their costs, and it was ordered that a sum of £108 4*s.* 11*d.* Annuities in Court, together with a sum of £4 7*s.* 9*d.* cash, should be applied in payment of the costs; and it was declared that the sum of £263 was a charge upon the Consols set apart for the annuity. No stop order was obtained by the plaintiffs. The costs were not taxed, and the sums of £108 4*s.* 11*d.* Annuities and £4 7*s.* 9*d.* cash remained in Court. The annuitant having died, *William Goodill* presented a petition in which the order of 1810 was mentioned and that of 1815 was not, and the sums of £108 4*s.* 11*d.* Consols and £94 14*s.* 9*d.* cash, dividends thereon, and the sum of £666 13*s.* 4*d.* Consols were ordered to be paid to him. Messrs. *A. & B.* (the names were not mentioned), who were not solicitors in the suit, acted as solicitors of *William Goodill* in the matter of that petition. A petition was then presented by the personal representative of the surviving trustee asking either that *William Goodill* and Messrs. *A. & B.* might be ordered to transfer into Court the sums obtained out of Court and that the same might be applied in payment of the costs directed to be paid in 1815, together with interest and costs, or that *William Goodill* and Messrs. *A. & B.* might be ordered to pay those costs. Messrs. *A. & B.* appeared by counsel on the petition, but *William Goodill* did not appear. Lord *Langdale* said (2): "There is no doubt of the principle, that if a solicitor, knowing that money which is in Court belongs to one person, presents a petition in the name of another, and

(1) 5 Beav. 585. (2) 5 Beav. 587.

STIRLING, J
1889
In re DANGAR'S TRUSTS

obtains payment, he is personally chargeable with the amount. I go further, if he has not the knowledge of the fact, but has knowledge of circumstances which, if duly considered, would lead to a knowledge of the fact, he must be made personally answerable for that loss, which his want of due consideration has occasioned. It is very rarely that such cases come before the Court. I only recollect one, which came before Sir *William Grant*, who said that the solicitor had better pay the money at once." Lord *Langdale* then dealt with the facts of that case and dismissed the petition as against Messrs. *A. & B.*, the solicitors, but his Lordship's statement of the law as to the liability of solicitors was clear and decided.

The question next came before the Court in the case of *Todd* v. *Studholme* (1), where a fund which had been paid into Court in a creditor's suit was distributed by mistake among specialty and simple contract creditors to the exclusion of a mortgagee. There had been an administration suit of *Hodgson* v. *Hodgson*, in which real estate, subject to a mortgage, was sold, and the purchase-money paid into Court. The mortgagee became a party to the deeds of conveyance in consideration of that payment being made. Messrs. *Gregg* acted as solicitors for the plaintiff in that suit. The mortgagee died. The money was paid out without the mortgage debt being satisfied. The legal personal representative of the deceased mortgagee filed a bill against several defendants to make them liable, and Sir *W. Page Wood*, V.C., held (2) that the plaintiff was entitled to recover from the defendants who had been paid simple contract debts the sums paid to them, the total amount of such sums being less than the plaintiff's claim: and from the only specialty creditor in *Hodgson* v. *Hodgson* so much as might be necessary to satisfy what might remain due to the plaintiff for principal moneys and interest, after deducting the total amount of the moneys paid to the simple contract creditors, whether parties to this suit or not; and from the solicitors of the plaintiff in *Hodgson* v. *Hodgson* whatever might be necessary to make good any deficiency arising by reason of some of the creditors becoming insolvent, or of others not being to be found, or the like: it being the duty of

(1) 3 K. & J. 324. (2) 3 K. & J. 325.

such solicitors to see that the purchase-money paid into Court was properly applied: and the solicitors were ordered to pay the costs of the plaintiff occasioned thereby. Sir *W. Page Wood* said (1): "But as regards the actual payment of the money out of Court, I must hold that the Messrs. *Gregg* did it with a want of care, which (although I entirely acquit them of the slightest suspicion of any other impropriety) is in itself, looking to the responsibilities incident to every dealing with the funds in this Court, a very serious matter. They have not adverted to the fact, that the money was paid into Court entirely on the faith that the mortgagee was to be paid his debt, and that it was entirely on the faith of such payment that he joined in the conveyance. They have taken on themselves to see the fund distributed, regardless of these facts; and whatever loss the plaintiff may sustain, whether by the insolvency of the parties or otherwise, it is for Messrs. *Gregg* to make good that loss."

The order which was made in *Todd* v. *Studholme* (2) is stated on page 341 of the report, and it declared that the plaintiff was entitled to recover the mortgage debt from the defendants, the several sums paid to them under the decree in *Hodgson* v. *Hodgson* in part satisfaction of the mortgage debt. It then dealt with a defendant, who was a specialty creditor, and with the sum paid in respect of the specialty debt; then declared that the defendants, the solicitors, were liable to make good any deficiency which might arise in payment to the plaintiff; and then it was ordered that an account should be taken of what was due to the plaintiff, and of what was payable by the defendants on the footing of the declarations; and that the plaintiff's costs of the suit should be taxed, and directed payment by the *Greggs* of such costs, and then the *Greggs* were to be at liberty to enforce the decree in respect of any "costs"—that word "costs" must, I think, mean "sums"—they might be called upon to pay and might pay on account of the deficiency in the moneys recovered by the plaintiff. But the point which I desire to remark upon in *Todd* v. *Studholme* is the fact that Sir *W. Page Wood*, in his carefully framed order, directed that recourse should first be had to the creditors who had been paid, and he then made the solicitors

(1) 3 K. & J. 337. (2) 3 K. & J. 324.

STIRLING, J. liable for any amount which the plaintiff might fail to get from the creditors.

1889

In re DANGAR'S TRUSTS

The next case to which I will refer is that of *Dixon* v. *Wilkinson* (1), which, though not strictly in point, is an important authority, because in it Lord Justice *Turner* stated the principle upon which the Court acts very clearly. It was a case in which an infant was interested in estates for the administration of which a suit was instituted by her through her next friend. After the plaintiff attained her majority she presented a petition asking that a firm of solicitors (who had represented her in the suit during her infancy), or some or one of them, might be declared to be liable for certain losses to her estate. Vice-Chancellor *Kindersley* dismissed the petition, the reason being thus stated, "As to the neglect and mismanagement of the suit, his Honour considered that there had been very gross negligence, but thought that he had no jurisdiction to give relief in a summary way for negligence however gross." From that decision the petitioner appealed. Lord Justice *Knight Bruce*, in dealing with the case, did not express a concluded opinion as to the jurisdiction; but said (2): "If a jurisdiction in this Court, of the kind and to the extent for which the plaintiff contends, exercisable as she alleges, does in truth exist, the Court is not, I apprehend, bound to act on it *ex debito justitiæ*, whenever a solicitor has, in the conduct of a suit here damaged his client by ignorance, mistake, neglect, or mismanagement. There must, I conceive, be a discretion in the Court as to exercising or declining to exercise the jurisdiction according to the circumstances of each particular instance where there is no fraud, if, in the absence of fraud, there is such a jurisdiction." And his Lordship's opinion was that the dismissal of the petition ought to stand, but he had no objection to declaring in the order that the dismissal was to be without prejudice to any action against the solicitors, or either of them, which the plaintiff might be advised to bring. Lord Justice *Turner* (3) said: "I am of opinion that the Court has jurisdiction to charge solicitors with losses sustained by their clients from their misconduct in the prosecution of suits.

(1) 4 De G. & J. 508. (2) 4 De G. & J. 520.
(3) 4 De G. & J. 522.

Solicitors are officers of the Court, and must generally be responsible to it for the due discharge of the duties which they undertake. The Court has constantly exercised this jurisdiction in cases of malfeasance. Where, for instance, a solicitor has used the name of a party without authority, it is almost a matter of course to order the solicitor to pay the costs incurred by the party in consequence of his name having been so used. Whether this jurisdiction, which undoubtedly exists in cases of malfeasance, extends to cases of mere neglect, I think it is unnecessary for us in this case to decide, but I am not satisfied that in principle any sound distinction can be drawn between cases of malfeasance and cases of nonfeasance, and looking to what was said by Lord *Eldon* in *Jolland's Case* (1), and to what I remember to have heard from him on some other occasion, though I cannot recollect or find the case, I strongly incline to the opinion that the jurisdiction is not limited to cases of malfeasance, but extends also to cases of mere neglect. I think, however, that, although the Court may possess this jurisdiction, the exercise of it must of necessity be rare, for the Court will not of course exercise it, unless it can do complete justice, and there are but few cases in which the measure of complete justice can be found. What is to be ascertained is the loss which the party has sustained; and, to take for an instance the dismissal of a bill through the neglect of a solicitor (the case of *Frankland* v. *Lucas* (2)), it must depend upon the plaintiff's case whether the dismissal was a loss to him or not. The case may have been such that the further prosecution of the suit would have been detrimental and not beneficial to him, and I apprehend the Court would hardly try the merits of the case upon an application against the solicitor. Such cases must generally rest in damages, and would therefore be left to be tried at law. In the case before us, I am of opinion that, assuming the jurisdiction to exist, we ought not to exercise it." His Lordship came to the same conclusion as Lord Justice *Knight Bruce*, that the appeal should be dismissed. We have in the judgment of Lord Justice *Turner* what appears to be a very valuable statement of the law, and of the circumstances under which the law ought to be put in force. In the first place his Lordship clearly

(1) 8 Ves. 72. (2) 4 Sim. 586.

STIRLING, J.
1889
In re DANGAR'S TRUSTS

based the liability of the solicitors upon their position as officers of the Court, saying that they must be responsible to the Court "for the due discharge of the duties which they undertake," and he gave as an example of the exercise of the jurisdiction of the Court those cases in which orders had been made against solicitors who had used the name of a party without authority, as by improperly filing a bill or instituting proceedings which were not authorized. In the next place his Lordship gave a strong expression of his opinion that the jurisdiction existed not merely in cases of misfeasance, but also in cases of nonfeasance, and that the jurisdiction is discretionary, and ought only to be exercised where the Court sees that complete justice will be done.

The next authority to which I will refer is the case of *Re Ward* (1). That was an administration suit, and a loss occurred in consequence of the receivers' (who had not entered into the usual recognizances) liability being only in the nature of a simple contract debt, and the plaintiff's solicitor was, at the instance of a defendant, made personally liable for the loss occasioned by his neglect. There were various defences, and amongst them that the claim was barred by the *Statute of Limitations*. The Master of the Rolls (afterwards Lord *Romilly*) discussed the nature of the liability of solicitors, and said (2): "The view I take is, that this is not, in the proper sense of the term, a case of negligence, for which a solicitor is liable to his client upon an action at law, but that it comes within a long established principle, well-known both at law and in equity. . . . The principle, on which I have always acted, and to which I have occasion constantly to refer, is this:—that if a man makes to another person, upon a solemn occasion, an assertion upon which that person acts, he lies under an obligation to make good his assertion," and his Lordship also said (3): "Now if there is one occasion more than another in which it is necessary for the Court to be strict with respect to such cases, it certainly is where the assertion is made, not by one indvidual to another, but where the assertion is made in an official character to the Court, who acts upon it;" and after referring to the transaction of business by the Court, and the

(1) 31 Beav. 1. (2) 31 Beav. 6.
(3) 31 Beav. 8.

undertakings by solicitors, and its coming to the knowledge of the Court that an act "without the performance of which the case could not have properly been heard had not been performed" continued: "I should compel the solicitor, at the instance of anybody interested in the matter, to make good his undertaking or assertion, on the faith of which the Court had acted; it is no answer to say, that it was the duty of many other persons to look into the matter and see that the act was duly performed (1). . . . The Court has imposed on it the duty of administering the estate for the benefit of all persons interested therein, it requires certain forms and regulations to be complied with, and it trusts to the assertion of the solicitor in many instances and acts upon it. Here the solicitor makes an assertion which turns out afterwards to be false . . . . but the fact of the assertion having been made, makes it incumbent upon the Court to hold that the party who made the assertion shall make it good, and that notwithstanding there were various persons who might have seen to it, but did not think fit. They were to blame, but their negligence was towards their own clients, although, no doubt, as officers of the Court, they were also blameable in respect to their duty to the Court itself." Then another question arose as to whether Mr. *Ward* was the solicitor of the plaintiffs. He was the country solicitor and upon the record; he employed *London* agents who represented themselves as the agents for the plaintiffs. The summons out of which the question rose was taken out by the agents acting for the solicitor, and they struck out the word "solicitor" and wrote the word "agents," and the Master of the Rolls said "in my opinion they were the mere agents of *Ward*, and they made the representation for him," and his Lordship held that Mr. *Ward* must, in the character of a solicitor of the Court, be declared personally liable to make good to the estate of the testator the consequences of the failure of the receiver just as if the recognizance had been entered into. That order was made in the administration suit, and in the matter of the solicitor (*Ward*).

The next case is that of *Re Spencer* (2), which was before Lord Justice *Giffard* sitting in lunacy. A fund was paid into Court

(1) 31 Beav. 9. (2) 18 W. R 240; 21 L. T. (N.S.) 808.

STIRLING, J.

1889

In re DANGAR'S TRUSTS.

under the *Trustee Relief Act* to the credit of the trusts of the will of *M.* A different person of the same name who was a lunatic was entitled to a life interest in the residue under the will of her sister *S.*, whose estate was under administration by the Court. There was a fund in Court to the credit of the estate of *S.* and also a fund in Court to the credit of the lunacy of *M.* By a mistake, which appeared to have originated in the office of the Accountant-General, the fund standing to the credit of the estate of *S.* was included in the account of the property of the lunatic, and was dealt with wrongly. When the mistake was discovered a petition of rehearing was presented intituled in Lunacy and in Chancery, in the matter of the *Trustee Relief Act*, and in the matter of the solicitors and their *London* agents, who had acted for the petitioners upon the petition on which the wrong order was made, and it asked, in effect, that the persons who had obtained payment of the moneys wrongfully and their solicitors and *London* agents might be ordered to replace them and to pay the costs. Lord Justice *Giffard* said that the principle which ought to be acted upon in every case of this description was this (1): "If persons either make or adopt a representation the contrary of which they ought to have known, and if they had exercised reasonable care, might have known, to be the truth, and obtain from the Court on the footing of the representation an order, which afterwards proves to be wrong, they are bound to indemnify the persons injured by that order from all the results occasioned by it," and applying that principle to that case as against those who obtained a wrong order the declaration was that the solicitors mentioned, who were respondents, were jointly and severally liable to indemnify the petitioners against any loss by reason of the funds having been wrongly parted with, and for the costs of the petitioners as between solicitor and client: and there was an order for payment against the persons primarily liable to pay the moneys and the costs and expenses, and in case the parties primarily liable failed to do so there was liberty for the other parties to apply. The respondents in that case were represented by eminent counsel, but it does not appear in the reports that they discussed the question of liability at all,

(1) 18 W. R. 242.

but only the question of primary liability for the loss of the funds, and that is the question which I must consider that Lord Justice *Giffard* directed his attention to in that part of the judgment which I have cited. The order made in that case, excepting that the declaration was that the respondents were jointly and severally liable, agreed in substance with and followed the terms of the order made by Vice-Chancellor Sir *W. Page Wood* in *Todd* v. *Studholme* (1).

There are two cases remaining which I desire to notice. In *Batten* v. *Wedgwood Coal and Iron Company* (2) certain purchase-moneys were, as ordered, paid into Court, but the plaintiffs' solicitor omitted to leave with the Paymaster-General the necessary request for its investment, and consequently it was not made, and an amount of interest was lost. On a summons Mr. Justice *Pearson* said (3): "Until I am corrected by a higher tribunal I shall hold that the Court has a summary jurisdiction to make a solicitor liable for not properly discharging his duty under such circumstances," and he held that the solicitor was responsible not only to his client, but to the Court for the due discharge of his duty, and that he must make good the loss of interest; that the liability could be enforced by summons, and that he must pay the costs of it. That case was brought to the notice of the Court of Appeal in *MacDougall* v. *Knight* (4), which originally came before Mr. Justice *North*. There the necessary request for the investment of money in Court had not been left with the Chancery Paymaster and the fund was not invested, and a summons was taken out by the plaintiff to make the defendants, their solicitors or agents, liable for the loss of interest which resulted from the non-investment. Mr. Justice *North* considered that the application was not well founded, and dismissed the summons, and the plaintiff appealed. Lord Justice *Cotton* is reported to have said that the plaintiff's solicitor had the carriage of the order which related to the investment, and it was unreasonable to say that he was justified in dividing the request, requesting the Paymaster to transfer the fund without requesting him to invest it. That disposed of the appeal, but his Lordship could

(1) 3 K. & J. 324.
(2) 31 Ch. D. 346.
(3) 31 Ch. D. 349.
(4) W. N. (1887) p. 68.

STIRLING, J.
1889
In re DANGAR'S TRUSTS.

not enter into the question how far the Court ought to follow the decision of Mr. Justice *Pearson* in *Batten* v. *Wedgwood Coal and Iron Company* (1) as to whether there was jurisdiction in a case like that to make a solicitor answerable for loss arising from negligence of duty. He expressed no opinion whatever on that question, and said that he must not be considered as assenting to the view expressed by Mr. Justice *Pearson*. In the report of *Batten* v. *Wedgwood Coal and Iron Company* it does not appear that the case of *Dixon* v. *Wilkinson* (2) was brought to the notice of Mr. Justice *Pearson*; nor does it appear from *MacDougall* v. *Knight* (3) what was the precise ground of the doubt which Lord Justice *Cotton* seemed to feel in regard to the decision of Mr. Justice *Pearson* in *Batten* v. *Wedgwood Coal and Iron Company*. But the present is different from both cases, as here what is complained of is not a mere nonfeasance, but a positive misfeasance. The solicitor (Mr. *Nelson*) took an active part in procuring the payment out of Court of moneys, and in so doing omitted to bring facts before the Court which were within his knowledge, thus making a misrepresentation, not intentionally, but, as I believe, through pure forgetfulness, as to the title to the funds.

Under all these circumstances I think that the current of authority is clear and decisive as to the liability of solicitors in cases of misfeasance, and, giving every weight to the expression of doubt of Lord Justice *Cotton* in the case of *MacDougall* v. *Knight*, I cannot find any doubt expressed or felt as to the liability in cases where solicitors knowing the true title of the fund take an active part in getting it dealt with in opposition to that title. It seems to me, therefore, that the liability of Mr. *Albert Ommanney Nelson* is established. He is liable for the consequences of his neglect in not having informed the Court of the true state of the title of the fund, because he must be taken to have known the true state of it by having acted as solicitor for the petitioner in the matter of the petition which was presented on behalf of *Louisa Mitchell* and the trustees of the will. The next question is whether this liability ought to be enforced in a

(1) 31 Ch. D. 316. (2) 4 De G. & J. 508.
(3) W. N. (1887) p. 68.

summary way or by means of an independent action, and it seems to me that the weight of authority is strongly in favour of enforcing it upon the present occasion, if the Court can see that no injustice will be done to the solicitor. Lord Justice *Turner* in the case to which reference has been made of *Dixon* v. *Wilkinson* (1) laid it down that the foundation of the jurisdiction was the duty which the solicitor owed to the Court as an officer of it, and Lord *Romilly* was obviously of the same opinion, and acted upon it in the case of *Re Ward* (2), and Lord Justice *Giffard* made a similar order in the matter of a solicitor, and there was no dissent expressed as to the jurisdiction, though I do not think I can treat that case as an absolute authority for exercising the jurisdiction in a summary way. Mr. Justice *Pearson* in *Batten* v. *Wedgwood Coal and Iron Company* (3), also held that he had jurisdiction, and Mr. Justice *Kay* in February, 1888, in the case of *Slater* v. *Slater* (4), made an order against a solicitor without the motion being intituled "in the matter of a solicitor." It was considered to be sufficient to serve the solicitor with notice of motion, and the order was made against him upon his appearing. Therefore it seems to me that there is jurisdiction in the Court to make an order summarily without requiring any separate action to be brought, provided only the Court sees that no injustice will thereby be done to the solicitor. That brings me to the question whether upon the state of the record in this case an order ought to be made against this solicitor. In the first place affidavits made by himself and his managing clerk have been filed, and the solicitor suggests that as he was not able to find any entry in his books of anything done by himself personally, he must have acted in 1871 simply as the agent of Mr. *Toller*, who was the next friend of *Louisa Mitchell*, upon the petition, and who was himself a solicitor; but is that defence open to Mr. *Nelson* upon this occasion? In my opinion it is not. Whatever may have been the relation between Mr. *Nelson* and Mr. *Toller*, Mr. *Nelson's* name was upon the face of the petition as the solicitor, and Mr. *Toller's* name was not disclosed, and consequently Mr. *Nelson* took upon himself a duty as an

(1) 4 De G. & J. 508.
(2) 31 Beav 1.
(3) 31 Ch. D. 346.
(4) 58 L. T. (N.S.) 149.

STIRLING, J.
1889
In re DANGAR'S TRUSTS

officer of the Court; and he must be held responsible for the discharge of his duty, that of bringing before the Court all matters which were essential for the Court to know, in order that the Court might deal properly with the fund. The same point was put in a different form, *i.e.*, that Mr. *Toller* should be held to be primarily liable for the loss, and having regard to the observations of Lord Justice *Turner*, and to the form of the order in *Todd* v. *Studholme* (1), if I thought that Mr. *Toller* was primarily liable, I should hesitate to make an order upon the present petition in his absence. I think, however, I ought not to require Mr. *Toller* to be made a respondent. Upon the record, Mr. *Nelson* stands as solicitor for the petitioner. He does not say that the business was not done by him or his clerks. The managing clerk says that he had no knowledge of the fact that the £500 was paid into the same account as the £7000, but that cannot be accepted as an excuse as regards him, because if he had applied his mind to the facts of the case, I think he must have found out how they really stood. However, that is quite immaterial, because whatever his managing clerk knew, or did not know, it was the duty of Mr. *Nelson* to see that his managing clerk was aware of the facts, and I cannot hold that the negligence of a managing clerk was an excuse to Mr. *Nelson*. I may add that Mr. *Nelson* does not go so far as to say that he believes in the existence of any instructions being given to him by Mr. *Toller*, which would afford an excuse to him for not bringing the facts as regards the £500 to the notice of the Court, and which might as between him and Mr. *Toller* make Mr. *Toller* primarily liable. On these grounds I cannot hold that as between Mr. *Toller* and Mr. *Nelson* a primary liability existed upon the part of Mr. *Toller*. The Petitioner does not call for any indemnity on the part of Mr. *Toller*, but asks for that of Mr. *Nelson*, and under the circumstances it seems to me that I must not give effect to the application of Mr. *Nelson* that the petition should be served upon Mr. *Toller*, and still less can I do so as regards the trustees. I think that the liability of Mr. *Nelson* exists, and that it is a liability which ought to be enforced upon the present occasion. The form of the order will be similar to the orders made in the

(1) 3 K. & J. 324.

cases of *Slater* v. *Slater* (1), *Re Spencer* (2), and *Dixon* v. *Wilkinson* (3), and it will be to the effect that the Petitioner must in the first instance, so far as she can, exhaust the fund coming from the estate of *Louisa Mitchell*, and which ought to have been paid to the Petitioner, and then there must be a declaration that Mr. *Nelson* must make good the deficiency which does not come from that estate, and if it be necessary Mr. *Nelson* will have liberty to enforce the order as against the estate of *Louisa Mitchell*. I understand the legal personal representative of *Louisa Mitchell* is willing to submit to account for the assets which have come to his hands in respect of her estate in the same manner as if an action had been brought against him for administration of her estate, the order will therefore direct an account of her estate on the footing of the Petitioner being a creditor. There must be an account against the solicitor of what has been lost to the Petitioner by reason of the order being wrongfully made, and, after taking into account what may be recovered from the estate of *Louisa Mitchell*, he must pay the balance; and he must also pay the costs of this petition as between solicitor and client.

Solicitors: *Mander & Watson*; *Nelson & Son*; *Hare & Co.*, agents for *Solicitor to the Treasury*.

(1) 58 L. T. (N.S.) 149. (2) 18 W. R. 240; 21 L. T. (N.S.) 808.
(3) 4 De G. & J. 508.

T. F. M.

KEKEWICH, J.

1889

Jan. 14, 15, 16; Feb 8.

HOBLYN *v.* HOBLYN.

[1887 H. 2952.]

Family Settlement—Influence of Father—Independent Advice—Benefit to Father—Release of Benefit—Settlement partly valid.

In regarding claims to upset re-settlements of family estates the Court gives weight to considerations which in other cases would not be allowed in the scale.

For the validity of such a re-settlement, the son being tenant in tail in remainder, it is not essential that the son should have independent advice, and the Court will not inquire whether the influence of the father was exerted with more or less force.

Where the father obtains a benefit, the jealousy of the Court is necessarily aroused; but such a transaction is not necessarily unfair, nor if unfair is it fatal to the validity of the entire arrangement; and the objectionable provisions may be expunged without affecting the rest of the deed.

Where in such a case the father abandons the benefit which he has obtained, the rest of the settlement may stand good.

UNDER the will of the Rev. *R. Hoblyn*, *W. E. P. Hoblyn* was tenant in tail in remainder expectant on the decease of his father *W. P. Hoblyn*, who was tenant for life of an estate in *Cornwall* of about 3000 acres, the income being about £1450.

W. E. P. Hoblyn attained the age of twenty-one years on the 3rd of March, 1879. By a disentailing deed dated the 25th of June, 1879, and duly enrolled, the estates devised by the will aforesaid were granted by *W. P. Hoblyn* and *W. E. P. Hoblyn* unto *W. T. W. Adams* and his heirs, to such uses as *W. P. Hoblyn* and *W. E. P. Hoblyn* should appoint, and in default of appointment to the use of *W. P. Hoblyn* for life, with remainder to such uses as *W. E. P. Hoblyn* should appoint, and in default to the use of *W. E. P. Hoblyn* and his heirs for ever.

By an indenture of re-settlement dated the 20th of October, 1879, the said estates were appointed and granted by *W. P. Hoblyn* and *W. E. P. Hoblyn*, and an adjoining farm of 116 acres was granted by *W. P. Hoblyn* to trustees for the term of ninety-nine years, on trusts for raising sums of £100 and £200 for the support of *W. E. P. Hoblyn* at the university, and thenceforward on trust to raise an annuity of £50 for *W. E. P. Hoblyn*

during the life of *W. P. Hoblyn*; and on further trusts, after the death of *W. P. Hoblyn*, for raising annuities of £75 each for the four daughters of *W. P. Hoblyn*, and subject thereto to the use of *W. P. Hoblyn* for life, and after his decease to the use that *Jane Hoblyn*, wife of *W. P. Hoblyn*, should during her life receive an annuity of £200; and subject thereto, to the use of the trustees for a term of 1000 years, on trusts for raising any sums not exceeding £2000, and payable as *W. P. Hoblyn* should appoint; and for raising four sums of £500 for the four daughters of *W. P. Hoblyn*; and subject thereto, to the use of *W. E. P. Hoblyn* for life, and after his decease to the use of the issue of *W. E. P. Hoblyn* as he should appoint, and in default of appointment to his sons and daughters in strict settlement; with remainder to the use of the four daughters of *W. P. Hoblyn* for their lives, with remainder over to their issue as *W. E. P. Hoblyn* should appoint, and in default of appointment to the four daughters successively in strict settlement; with ultimate remainder to *W. E. P. Hoblyn*, his heirs and assigns.

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W. P. Hoblyn had, under the power in the settlement, appointed the sum of £2000 to *E. A. Thomas*, by way of mortgage to secure the repayment of the sums of £500 and £400 lent to *W. P. Hoblyn*. It was admitted that the £500 was raised and applied for the benefit of *W. E. P. Hoblyn*.

The settlement contained a recital that *W. P. Hoblyn* had spent large sums on the estate, by which its annual value had been largely increased. The settlement also contained powers of management and letting, including a power to raise £2000 for improvements, and other clauses which are sufficiently referred to in the judgment.

W. E. P. Hoblyn brought this action against *W. P. Hoblyn* and his wife, and against the four daughters, and against the infant children of one of them, and against the trustees of the settlement, alleging that he had executed the settlement under the influence of his father, and without independent advice, and without understanding the true purport and effect thereof: and he claimed to have the settlement cancelled and set aside without prejudice to the rights and interests of *E. A. Thomas* and of another mortgagee.

KEKEWICH, J
1889
HOBLYN v. HOBLYN

The circumstances under which the settlement was executed, as appeared by the evidence, are fully stated in the judgment. The Plaintiff was alleged to have confirmed the settlement by the execution of deeds based on the estates and powers thereby granted, but the point was not decided and is omitted from the report.

After the action had been commenced, *W. P. Hoblyn* by the pleadings and at the bar offered to release his right to charge the estate further than with the £500 and with the £400 raised for his own use, and indemnified the estate against the charge of £400; and Mrs. *Hoblyn* offered to release her right to the £200 a year. The releases were executed before the judgment was delivered.

This was the trial of the action.

Barber, Q.C., and *Methold*, for the Plaintiff:—

The father in this case obtained a direct pecuniary benefit from this re-settlement, and it is therefore incumbent on him to shew that it was executed with full knowledge by the son and under no influence of the father: *Hoghton* v. *Hoghton* (1); *Savery* v. *King* (2); *Bellamy* v. *Sabine* (3). The deed, no doubt, states that the father had spent large sums in improving the estate, but no accounts were shewn to the son, and he could not have known that it was so. The deed is ill drawn and improper, and it will be for the benefit of all parties to have it set aside. The farm added is scarcely worth the mortgage on it.

Mr. *Whitefield*, the solicitor who prepared the deed, the father and the son, and other witnesses were then examined as to the circumstances under which the deed was executed.

Stock, for the father, mother, and daughters.

Warmington, Q.C., and *Clydesdale*, for the infant children of one of the daughters:—

The farm added adjoined the estate, and was therefore valuable to the estate, so that the father gave consideration. The trans-

(1) 15 Beav. 278. (2) 5 H. L. C. 627.
(3) 2 Ph. 425.

actions between father and son are not to be examined as if they were between strangers. The father has always more experience and ought to have an influence over the son. The Plaintiff understood generally that he was giving benefits to his mother and sisters, and it is not necessary to shew that he understood all the terms of the deed. The only real complaint is that the mother and sisters have got too much: and that the father ought not to have had power to raise the £2000. But he has only raised £400 for himself, and he has released the rest of his power and has indemnified the estate: *Hoghton* v. *Hoghton* (1).

Ingle Joyce, and *Whitaker*, for other parties.

Barber, in reply:—

It is not easy to draw a line and define the exact principles on which the Court acts as to family deeds: *Huguenin* v. *Baseley* (2). The Plaintiff does not wish to disturb the mortgages already effected, and would leave to the discretion of the Court what provision ought to be made for his mother and sisters if the deed is set aside. No doubt the Plaintiff was not altogether ignorant of what he was doing, but he was not sufficiently informed. There were reasons for barring the entail, but it is clear that the son did not know that that could be done without a re-settlement. Had he been properly informed or had independent advice he would never have executed such a deed.

1889. Feb. 8. KEKEWICH, J.:—

Is the Plaintiff entitled to set aside the settlement of the 20th of October, 1879? That is the question before me. The solution depends on 1, the character of the settlement; 2, the contents; 3, the circumstances under which it was prepared and executed. Let me treat these matters separately, and in connection with each of them consider the legal principles affecting it.

1. The character of the settlement.

It is not a simple disposition by the Plaintiff of his own property without the intervention of any other contracting party,

(1) 15 Beav. 278. (2) 14 Ves. 273.

KEKEWICH, J.
1889
HOBLYN v. HOBLYN.

in other words, it is not a voluntary settlement. It may still be important to inquire how far the Plaintiff knew what he was doing, but that cannot be the sole test of his right to relief. The rule of *Dutton* v. *Thompson* (1) is inapplicable. This settlement belongs to that class of settlements usually styled family arrangements, which might properly be said to be made for value, and yet are not generally so described, because they more often than not want the distinctive features of purchase and sale; and beyond the give and take which invariably enters into them there is something else which of itself prevents their being voluntary.

In regarding settlements of this character, claims to upset them, and the rights of parties thereunder, the Court gives weight to considerations which on other occasions would scarcely be allowed in the scale. The duty to preserve in the family property hitherto held by it is recognised, so is also the duty of providing for those members of the family who are not intended to succeed to the property, and the harmony which may thus be expected to be established is respected. There are frequently other considerations, such as the preservation of the honour of the family, but they more often concern arrangements different from that now under investigation, which is what is called a re-settlement—that is, a renewal on a fitting occasion, as the majority of the eldest son, of the ties which the father and son or other successive owners are by law enabled to dissolve. It is not uncommon on such an occasion to take out of settlement some property convenient to be sold or to be diverted to other uses—it is at least as common for one of the parties to bring in some property convenient to be included which he has acquired as his own. Such circumstances must not be forgotten in considering when it is necessary, as here, to consider a claim to set the settlement aside, and strictly they may be said to destroy the renewal character of the settlement; but none the less I think that this would properly be described as a re-settlement, and for the purpose of ascertaining rights connected therewith would be regarded from that point of view. Again, in such documents one generally finds provision for the wives and younger children

(1) 23 Ch. D. 278.

of the successive owners or some of them; an immediate provision for the next owner; powers to raise money for defined purposes connected with the property; and other powers of a cognate character, the extent of which as regards the amounts charged and otherwise necessarily depends on a variety of circumstances which never can affect two families or two properties in the same manner. Therefore the Court would not regard the presence or absence of any such power as an indication of impropriety in the preparation of the settlement, nor the largeness or smallness of an amount charged or liable to be charged as an indication of unfair dealing between the parties, unless, indeed, there were such extravagance as to justify the suggestion that it could not have obtained the consent of a reasonable man.

On what does this presumption in favour of the propriety and reasonableness of a re-settlement rest? Take the frequent case, illustrated here, of such a settlement made by father tenant for life in possession and son tenant in tail in remainder shortly after the latter attains his majority. Does the Court presume that the son has had independent advice, or insist that he ought to have had it? I think not. Where proper precautions are taken the position of the son as tenant in tail is fully explained to him, as are also the proposed limitations of and burthens on property which would otherwise in the ordinary course of nature become absolutely his own. And if this duty is often, and in simple cases sufficiently, discharged by the father's solicitor, it is sometimes with advantage handed over to another solicitor called in for the particular purpose, or, according to a commendable practice familiar to me through an eminent conveyancer, referred to counsel instructed to advise the young man independently. To omit all these precautions is to incur risk. I shall have hereafter to refer to the circumstances under which the settlement in question was prepared and executed, but I may at once say that though I acquit Mr. *Whitefield* of impropriety of conduct, and, indeed, I am sure that he intended to act for the best according to his view of the situation and of his duty to the parties, yet it is obvious that his conduct provoked the attack on the settlement. If like conduct were the practice of the profession no settlement would be safe from litigation.

KEKEWICH, J.
1889
HOBLYN v. HOBLYN.

A re-settlement is generally the father's work. He more often than not proposes it, and, though perhaps largely assisted by his solicitor or man of business, his is almost always and necessarily the guiding hand throughout. This necessity flows not merely from the parental influence which is probably its main source. In the ordinary case, such as occurs here, the intelligence and information of the son, whether great or small, are overshadowed by the experience of the father, who, in addition to general knowledge of the world, is well acquainted with the capacities and wants of the estate, the needs of different branches or members of the family, and the obligations which the family history has imposed on those in possession of its honours and property. The Court has always recognised this necessity, and, conceiving it to be for the benefit of families that such influence should be exerted to effect a proper re-settlement on a fitting occasion, has declined to inquire whether in any particular instance it was exerted with more or less force. This is the result of many authorities, to some of which reference is made in *Hoghton* v. *Hoghton* (1). Lord *Romilly* himself adopts it there and elsewhere, and it is neatly stated by Vice-Chancellor *Hall* in *Fane* v. *Fane* (2), where he says, "The parental influence in reference to such re-settlements, where there is no other consideration or element in the case, is, I conceive, to be disregarded." The parental influence here intended is that which the experience of mankind has proved to be both natural and good, the influence begot by affection rather than fear: see Lord *Hatherley's* remarks, *Turner* v. *Collins* (3). When it can be traced to less worthy causes, and especially, if being so traced, it seems to have had an excessive operation, it is styled undue and is differently treated: see *Wycherley* v. *Wycherley* (4).

The rule thus stated is applicable in its integrity only to cases of an ordinary character where there has been no large departure from the practice usually followed in the re-settlement of family estates. One circumstance which justifies an exception from, or at least a modification of the rule, is a benefit acquired by the father to the detriment of the son. The character of the

(1) 15 Beav. 278.
(2) Law Rep. 20 Eq. 698, 706.
(3) Law Rep. 7 Ch. 329, 340.
(4) 2 Eden. 175.

re-settlement is then somewhat changed. It imports a bargain between the contracting parties, and the jealousy of the Court is aroused to inquire whether one of them unduly influenced the other in effecting it. But note two things—first, such a bargain is not presumably unfair; secondly, if unfair, or unfairly effected, it is not necessarily fatal to the entire arrangement. On the first point it is sufficient to say that many circumstances of common occurrence would justify a father in demanding a benefit direct or indirect for himself; and as regards the second I need only refer to *Hoghton* v. *Hoghton* (1), where the Court was satisfied that there was a benefit to the father obtained without due protection to the son, and yet took pains to explain that in addition there were unreasonable provisions in the deed which assisted the Court to interfere. This is stated in a passage on p. 314, and is also I think a fair conclusion from the rest of the judgment, though it is sometimes difficult to determine whether the particular language should be more properly referred to the subject of re-settlements generally or exclusively to those in which the father gains a benefit. Lord *Campbell* read the judgment as I do: see *Jenner* v. *Jenner* (2). *Hoghton* v. *Hoghton* was relied on in *Turner* v. *Collins* (3) as an authority that a transaction between father and son must be set aside wholly if at all, and could not be rectified by striking out an improper provision. That was not a case of re-settlement, but the Lord Chancellor (Lord *Hatherley*) accepted the analogy, and held that rectification was possible as against a party admitting it to be proper, notwithstanding that the transaction stood as a whole. I cannot myself discover any satisfactory reasons for destruction where the settlement is generally good, the intention of the parties ascertainable, and reform possible, when, that is, one can preserve what is substantially right by expunging what is substantially wrong. In *Jenner* v. *Jenner*, the plaintiff asked for reform only, and no objection was taken to his suit on that ground.

2. Contents of the settlement.

The general scope of the deed is plain enough and open to no objection. The father adds to the property an estate (in mort-

(1) 15 Beav. 278. (2) 2 D. F. & J. 359, 375.
(3) Law Rep. 7 Ch. 329.

KEKEWICH, J.
1889
HOBLYN v. HOBLYN

gage) contiguous and intermixed therewith, the father and son have successive life estates, and the remainders are in favour of the son's issue, his sisters and their issue, the ultimate remainder being properly limited to him. A pittance is secured to him during his father's life. There are jointures and portions charged or empowered, there is a power to charge for permanent improvements, and there are divers other provisions, which speaking generally are commonly found in such instruments. I do not specify any, because I must refer again to those worthy of mention, and for the moment I omit all notice of one special provision which has created the real difficulty in this case. Omitting that, what then is there unreasonable in such a settlement? "Reasonable and usual" are not, nor are "unreasonable and unusual" convertible terms. An unreasonable provision in a re-settlement is one which it is inconceivable that prudent men well advised would, having regard to all the circumstances, have inserted. And in order that a party complaining of the settlement may take advantage of this, it must also be prejudicial to his interest or to that of some person, *e.g.* child for whom he presumably intends to provide. Extraordinary or unusual provisions falling short of this may be evidence of want of care, as may also omissions of what is usual, and these may provoke inquiry or be otherwise suggestive, but they are not unreasonable so as on that account to support an allegation that the son was not adequately protected in the terms of the bargain.

There are many unusual provisions in the settlement before me—many instances of want of care. The father had expended in the improvement of the property, including that purchased by him, large sums which, though not accurately ascertained, amounted to many thousand pounds. (He mentioned having spent £4000 in one sum.) The recital to this effect was proper enough, but the addition that he had thereby more than doubled the annual rental value was untrue. A power to appoint among children is not usually given to a tenant for life where it is intended to settle property on the sons successively in tail, and I find no trace of any instructions to this effect. The limitations to the son's sisters and their issue are certainly strange, and perhaps unintelligible, and there are many other passages such

as the intermixture of the trusts of terms difficult to construe. The amount empowered to be laid out in improvements is largely in excess of what is usual, having regard to the value of the property. The power to reserve a nominal rent for as many as ten years of a lease is also unusual, and the power to invest in leaseholds without any restriction might almost be said to be a solecism. I cannot, however, treat any of these provisions as unreasonable in the sense above mentioned. It is not necessary to say another word about bad drafting. There was certainly nothing improper in providing for expenditure on future improvements, and though the sum of £10,000 seems to have been carelessly fixed, and the clause is inconsistent with the recital, yet there are safeguards which if difficult to construe must operate to the protection of the inheritance. I cannot suppose that reservation of a nominal rent will be largely adopted by a tenant in possession, young or old, and the investment in leaseholds is fettered by the trustees' discretion. On the whole, therefore, I think that this strange settlement cannot be upset on the ground that these provisions, or some others which I have not thought it worth while to specify, are unreasonable.

There is one provision remaining to be considered. I pointed out in the course of the argument that clause 4 is not strictly a power to the father to charge the property with £2000, but is a power given to him to appoint a sum of £2000 charged by the settlement itself, through the term of 1000 years. The distinction might be important from at least one point of view, but the clause may be conveniently considered to confer, as in substance it does, a power to charge. It is a direct benefit to the father, and imposes on him the burden of proving that the bargain with his son was fair and fairly made. No presumption in favour of the propriety or honesty of the paternal influence has ever been allowed or ought to be allowed to relieve him of that obligation. I am far from saying that such a power to charge a moderate amount may not reasonably be inserted in a re-settlement, and where the father is bringing new property into settlement, and has expended large sums in improvements, it is neither unusual nor objectionable, but it can only be done with the consent of the son duly informed and protected. It is for this reason, and not

KEKEWICH, J.
1889
HOBLYN v. HOBLYN.

because the amount charged is excessive, that the particular clause has occasioned and justified the litigation.

There must here be noticed the jointure of £200 given to Mrs. *Hoblyn*, the Plaintiff's mother. There is some authority for holding that a charge of this kind ought not to be regarded as a benefit to the father within the rule just mentioned, and I should so hold if necessary in the present case, but it must not in my judgment be considered that under no circumstances a charge of that character would be such a benefit.

3. The circumstances under which the settlement was prepared and executed.

The settlement bears date the 20th of October, 1879, and may be taken to have been executed on that date, but it was prepared and finally settled much earlier in the year, and the inquiry need not extend beyond the 26th of July when it appears to have been engrossed. The earliest date of which one need think is not accurately ascertained, but it was before, and not much before, the 3rd of March, the Plaintiff's birthday, and may be taken to be in the last few days of February or the first day or two of March. The Plaintiff was living at home with his father, mother, and sisters, and it seems on affectionate terms with all of them. I do not gather that his education or habits gave him special facilities for understanding such a matter as the re-settlement of the family property, but, on the other hand, I must give him credit for average intelligence. While living at home he had been accustomed to go about the estate, including the property which his father had purchased. He had seen the buildings erected and other improvements, and knew that this had been done at his father's cost. He was on friendly terms with Mr. *Hancock*, the estate agent, with whom he seems to have had occasional conversations. He says that his mother first introduced the subject of a re-settlement, but she does not appear to have said much beyond expressing the father's anxious desire. This was before he attained twenty-one. The father also mentioned it to him before that date. He likewise said little. I cannot make out why he thought it better to say little, but he did, and preferred that the matter should be mentioned to his son by Mr. *Hancock*. For that purpose Mr. *Hancock* made a note in

two parts, one containing briefly what was proposed—the other stating the rental of the estate, with deductions for interest on the mortgage and the amount required to pay off charges to be made in favour of the sisters. Of the first part of this note he communicated the substance to the Plaintiff, but of the second he gave him a copy. Mr. *Hancock* has been called, and has explained that this not being a matter of his ordinary business he has not recorded what took place, nor can he remember with accuracy what passed between him and the Plaintiff. I think that either he or the father must have told the Plaintiff more than either of them thinks was now told him. But at any rate the Plaintiff had the advantage of conversations with a gentleman of intelligence who, if not profoundly versed in legal matters, was at least well acquainted with the estate, its capacities and needs, and was able to give him sound practical advice. The father alone instructed Mr. *Whitefield* in the first instance, and this he did after ascertaining that the Plaintiff was in the mind to execute the proposed re-settlement. There was an interview at Mr. *Whitefield's* office on the 4th of March, 1879, when, be it observed, the Plaintiff had attained twenty-one. No one of the parties present at that interview can give a full account of what took place, and, unfortunately, Mr. *Whitefield's* entries as regards this and other interviews, are less useful than would otherwise be the case, because he had engaged to do the whole business for a lump sum of £20, and was therefore not concerned to record particulars with professional accuracy. His memory unfortunately altogether fails, and in truth he can only say that he believes his entries to be correct. All agree that at the interview of the 4th of March the Plaintiff said but little, but remembering that he had previously been instructed by Mr. *Hancock*, and had also been spoken to by his father, I see no reason to doubt that he sufficiently understood the general outline of what was proposed. Of course, he did not understand the mysteries of entail, and probably even now would be puzzled to define his position as tenant in remainder under *Robert Hoblyn's* will, but he did know that if he survived his father he would become master of the family estate, which if he did not (omitting the uncontemplated event of marriage and issue) would then go over to a collateral branch of the

KEKEWICH, J.
1889
HOBLYN v. HOBLYN.

family. And he further knew that the property purchased by his father was not included in the family settlement, and might with advantage be included therein. He was also aware that his sisters were unprovided for, and thought it reasonable (as it was) that they should be provided for out of the settled property. Probably he also knew that his mother had no jointure, and was willing that she should have one. The general terms of the re-settlement were discussed at this interview. They were afterwards varied in many particulars, but with one exception these variations were made on the instructions of the father only, and no communication, direct or indirect, with the son is proved. I can hardly believe that there was not some communication between the father and the son respecting them as there certainly was about the excepted variation, but I repeat that there is no evidence of it. The excepted variation is important. It had been arranged on the 4th that a lump sum (£8000) should be charged for the sisters. It was afterwards suggested by the father or the son, it is impossible to say which, but probably the father, that for this should be substituted a charge of annuities and a less sum £2000, and this was communicated to Mr. *Whitefield* by the son on the 10th of March. Mr. *Whitefield* enters it as the son's proposal, but says that he regarded him as the father's messenger. I think that neither view can be accepted as correct, and that really the instructions must be taken to have been those of the father and son jointly. Ultimately the deed was settled on the basis of the original instructions thus varied, and it is the re-settlement whose contents I have already sufficiently summarised. There had crept into it (no one knows how) the charge of £2000 in favour of the father which I will deal with presently.

The necessary disentailing deed was executed long before the resettlement. There apparently was no explanation to the son why two deeds were required, nor was it explained to him what the effect of the disentailing deed standing alone would have been. He regarded the two as being what in truth they were, parts of one transaction, and I am not disposed to attribute weight to any other view of them. It is matter of regret that greater care was not taken throughout the business, and that what took place was not more accurately recorded. But though

I regard the case as one of extreme difficulty, and lying on the border-line which divides settlements supportable notwithstanding the exercise of parental influence, and those which the Court sets aside because the son has not been sufficiently protected; yet on the whole, after the best consideration I can give to the facts, including of course many details which I have not thought it worth while to specify here, and the authorities on this branch of law, including of course many not separately cited, I have come to the conclusion that, except as regards the charge for the father's benefit, the re-settlement of the 20th of October, 1879, is a reasonable embodiment of what was in substance intended by the son, as well as by the father, and therefore cannot be set aside.

But this charge—how came it to be there? Mr. *Whitefield* told us nothing about it; there was not a suggestion of mention to the son, and strange to say the father alleged it to be a mistake. This he enforced by the statement, which was not put to Mr. *Whitefield*, that when in 1883 there was a proposal to raise money under this charge, he declared that it did not exist, and was not easily convinced. But there it is, and there it ought not to have been. It stands so completely alone, and might if not exercised be so easily removed without affecting the rest of the deed, that, arguments to the contrary notwithstanding, I think it might properly be expunged, and the settlement as a whole preserved. But the father has saved me all trouble on this score. He has executed a deed releasing his power and indemnifying the inheritance against the charge of £400 raised for his own occasions. That indemnity is not equivalent to a release, the inheritance still remaining charged, and no security being given; but I think it would be adherence rather to the letter than the spirit of authorities to say that anything remains obnoxious to the rule which precludes a father from taking a benefit without due protection to the son. The £500 which was raised for the son's benefit continues a charge. He cannot complain of that. Mrs. *Hoblyn* offered at the trial to release her jointure, and this has been done. I have, therefore, been relieved from considering this part of the settlement as carefully as others, and I need say no more about it.

KEKEWICH, J.
1889
HOBLYN v. HOBLYN.

The result is that the Plaintiff's claim to set aside the settlement fails. He and the estate will be exonerated from the charge in favour of the father, except so far as it has been utilised for the Plaintiff's own benefit, and also from the jointure to the mother. There will, therefore, be judgment for the Defendants. The father, of course, can have no costs. He must be held responsible for the charge in his favour, and he has admitted the responsibility by releasing it. Indeed, I take it that he would not in any case have asked for costs. This last remark applies to the mother also, who has released her jointure. The Plaintiff must pay the costs of all the other parties.

Solicitors: *Emmet, Son, & Stubbs; Coode, Kingdon, & Co.*, agents for *Coode & Shilson, St. Austell; Whitakers & Woolbert.*

C. M.

In re SKEGNESS AND ST. LEONARD'S TRAMWAYS COMPANY.
Ex parte HANLY.

C. A.
1888
CHITTY, J.
June 13, 14.
C. A.
Dec. 15, 16, 21.

Company—Winding-up—Costs of obtaining Special Act incorporating Company—Costs of obtaining further Special Act after Incorporation of Company—Claim by Parliamentary Agent—Promoter—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16), *s.* 65 [*Revised Ed. Statutes, vol. ix., p.* 576.]

The special Act incorporating a tramway company provided that the costs, charges, and expenses of and incident to the preparing, applying for, obtaining and passing of the Act should be paid by the company.

The Act was obtained by a parliamentary agent, who was employed by *S.*, a person who had taken an active part in the promotion of the company, but who was not mentioned in the Bill or in the Act, and who never became a member of the company. After the company was incorporated the parliamentary agent, either of his own accord or upon instructions from *S.*, procured for the tramway company another Act, which contained a similar provision as to the payment of the costs, charges, and expenses of obtaining it. The seal of the company was affixed to the petition for this second Act, but without authority.

The company never had any board of directors or body of shareholders capable of entering into a binding contract or of exercising any of the statutory powers, and it was ordered to be wound up shortly after the passing of the second Act:—

Held (affirming the judgment of *Chitty*, J.), that the parliamentary agent was not entitled to prove against the company in the winding-up in respect of the costs, charges and expenses of either of the Acts.

Those persons only who do work directly for a company in process of formation, without being employed by anyone else for hire or reward, are entitled to look to the company when formed, for payment of the costs and expenses of the work of which the company has got the benefit, and those persons who are employed by anyone else to do the work for hire or reward must look to the person who employed them.

MR. *C. J. HANLY*, a parliamentary agent, practised for some time prior to September 1, 1883, in his own name. On that date he entered into partnership with a Mr. *Roberts*, and thenceforth he and his partner practised under the firm of *C. J. Hanly & Co.*

In the autumn of 1882 the formation of a company for constructing and working a tramway from *Skegness* to *St. Leonard's* and *Alford* in the county of *Lincoln* was projected. Mr. *C. W.*

C. A.
1888
In re SKEGNESS AND ST. LEONARD'S TRAMWAYS COMPANY.
Ex parte HANLY.

Spark, an engineer, who had an interest in certain property near *Skegness*, took the chief part in the formation of the company, and he instructed Mr. *C. J. Hanly* to obtain the special Act for incorporating it. Mr. *Spark*, however, was not nominally a promoter of the company, his name was not mentioned either in the Bill or in the Act, and he never agreed to take shares in the company or become a member of it. Messrs. *Cropper* and *Mallett*, two other gentlemen who were interested in land in the neighbourhood of the projected tramway, were nominally the promoters of the company, and permitted their names to be used as the petitioners for the Bill, upon the understanding, both with *Spark* and *C. J. Hanly*, that they should not be under any liability for the costs of obtaining the Act. They also found the deposit money for the Act, which amounted to £2574 5*s.* 2*d.*, borrowing it from the *British Mutual Bank*; and Mr. *C. J. Hanly* gave the bank a written agreement that he would not look to the deposit for his costs, or do any act or make any claim which might prejudice their security on the deposit.

Mr. *C. J. Hanly* obtained the Act, which was entitled "*The Skegness, Chapel, St. Leonard's and Alford Tramways Act*, 1883."

This Act, by sect. 4, incorporated as a company Mr. *Cropper* and Mr. *Mallett*, and all other persons "who have already subscribed or shall hereafter become promoters." By sect. 33 it enacted that "the number of directors shall be four, but the company may from time to time reduce the number, provided that the number be not less than three." By sect. 35, it enacted that "The quorum of a meeting of directors shall be three, and two if the number be reduced to three."

By sect. 36 it provided that Messrs. *Cropper* and *Mallett*, and two other persons to be nominated by them and consenting to such nomination, should be the first directors, and should continue in office until the first ordinary meeting of the company; and sect. 72 was as follows: "All costs, charges and expenses of and incident to the preparing, applying for, obtaining and passing of this Act, or otherwise in relation thereto, shall be paid by the company."

The Act incorporated the *Companies Clauses Consolidation Act*, 1845, the 65th section of which enacts "that all the money raised

by the company, whether by subscriptions of the shareholders, or by loan or otherwise, shall be applied, firstly, in paying the costs and expenses incurred in obtaining the special Act, and all expenses incident thereto; and, secondly, in carrying the purposes of the company into execution."

Mr. *C. J. Hanly's* costs and charges for obtaining the Act amounted to £767, and prior to the passing of the Act he received from Mr. *Spark*, in 1883, £300, in three payments of £100 each; he did not, however, give credit for this £300 in the claim which he subsequently sent in to the liquidator, because, as he alleged, there were other money transactions between them which he considered should be adjusted.

The Act received the royal assent on the 2nd of August, 1883, but the company never had any real active existence. Five persons acted from time to time as directors, but there never was any directors' meeting at which a proper quorum of directors was present. No shares were ever duly applied for or allotted, and from first to last the only shares which could ever be said to be held in the company were the thirty qualification shares attributed to each of the five persons who had acted as directors, and three shares which were allotted to the solicitor, and one share which was allotted to the secretary, in each case in respect of services rendered, making altogether 154 shares out of a capital of £53,000 in 5300 shares of £10 each, and no valid meeting of shareholders was ever held.

In 1885 a further special Act for the abandonment of a part of the undertaking and for an extension of time for completion was obtained by Messrs. *C. J. Hanly & Co.* The seal of the company was affixed to the petition for this Act in December, 1884 (when Mr. *C. J. Hanly* became a director of the company), but upon the view which the Court took of the evidence (which will be found in the judgment of Mr. Justice *Chitty*), it was not affixed by any person authorized in that behalf; and the Act was obtained by *C. J. Hanly & Co.* either of their own accord or upon instructions from Mr. *Spark* and not upon any retainer by the company.

This further Act also incorporated the *Companies Clauses Consolidation Act*, 1845, and it contained in sect. 45 a provision as to

C. A.
1888
In re SKEGNESS AND ST. LEONARD'S TRAMWAYS COMPANY.
Ex parte HANLY.

the costs of obtaining it similar to that contained in sect. 72 of the special Act of 1883.

The costs and charges of Messrs. *C. J. Hanly & Co.* for obtaining this Act amounted to £785 17*s*.

On the 3rd of July, 1886, upon the petition of Mr. *Spark*, who claimed to be a creditor for moneys expended by him partly in paying parliamentary agents' charges, the company was ordered to be wound up, and in 1887 an Act was passed for the abandonment of the undertaking.

Claims were carried in in the winding-up of the company by Mr. *C. J. Hanly* for £767 in respect of the costs of the Act of 1883, and by Messrs. *C. J. Hanly & Co.* for £785 17*s*. in respect of the costs of the Act of 1885. These claims having been disallowed in Chambers, the adjudication was brought before Mr. Justice *Chitty*, and heard on the 13th and 14th June, 1888.

The claim in respect of the costs of the Act of 1883 was argued first.

Romer, Q.C., and *William Evans*, for *C. J. Hanly*.

Byrne, Q.C., and *L. E. Pyke*, for the liquidator.

CHITTY, J.:—

This is a claim by Mr. *Hanly*, a parliamentary agent, for £767 in respect of a bill of costs which includes services rendered by him in the obtaining of the Act of Parliament by which the company was incorporated, and also disbursements out of pocket, and the like. The question is whether Mr. *Hanly* can maintain this claim against the company; in other words, whether he is a creditor for this or for some other less amount against the company. The evidence shews to my satisfaction that the real promoter of this undertaking was Mr. *Spark*, and that Messrs. *Cropper* and *Mallett* were subsequently found, and their names made use of as being convenient names to put into the Bill.

A question has arisen, which is one of mixed law and fact, who were the promoters. Technically I take it that the persons whose names appear in the Bill, and whose names appear in the Act of Parliament, are the promoters, the persons in fact

who, like Messrs. *Cropper & Mallett* in the case before me, sign the petition on which the Bill is introduced. But I am not prepared to say that I cannot look behind that, and find who the real promoter was. If I am at liberty, as I think I am, to go behind what appears upon the face of the documents themselves, I should say that Mr. *Spark* was the real promoter here. The reasons for which I make that statement are these: not only is there the bill of costs, but there is a long correspondence which was passing between Mr. *Hanly* on the one hand and Mr. *Spark* on the other while the Bill was pending, from which it appears (as well as from the bill of costs) that Mr. *Spark* was consulted at the various stages in the proceedings to obtain the Act of Parliament; and what is more, that Mr. *Hanly* was applying to him from time to time as the person liable to him for payments on account of what he himself was doing, and who in the progress of the Bill (not always at once when demanded, but from time to time and after a little pressure) made payments, the sum of which is £300.

Now I think on the evidence, having regard to the cross-examination, and the evidence in chief of Mr. *Hanly*, that the true view of the facts is that Mr. *Hanly* looked to *Spark* and *Spark* alone, and gave credit to him, and was employed by him. It is unquestioned that he is entitled to sue *Spark*, and I cannot see that there is anything in the evidence to justify the suggestion made by Mr. *Hanly's* counsel at the bar, that Mr. *Hanly* looked to *Spark* in one event only, namely, in the event of the Bill not passing; and that in the event of the Bill passing, then he looked to the clause which is found in the Act. The claim of Mr. *Hanly* is simply based on the clause in the Act, which is in the usual form, as to payment of the expenses of obtaining the Act. He has no contract with the company, and the suggestion that he looked to *Spark* in the one event, of the Bill not being carried, but looked to the clause in the Act in the other event, is entirely a suggestion of counsel and not founded on the evidence before me.

Now, as appears from the evidence, this company between its incorporation and its winding-up was doing something, though very little, for a period of three years; and during that time no

C. A.
1888
In re SKEGNESS AND ST. LEONARD'S TRAMWAYS COMPANY.
Ex parte HANLY.
Chitty, J.

claim was made against the company itself by Mr. *Hanly*, who being a parliamentary agent, was a man of business. That is a very strong point against him. Had he been looking, and giving credit, as it were, to the clause, and had he done the work on the faith of it, there would, according to the ordinary course of human affairs, have been a claim sent into the company. But there was no such claim, and Mr. *Spark* on the evidence is still liable to Mr. *Hanly*. It is true that Mr. *Spark* has not made any claim against the company, but Mr. *Hanly* cannot succeed because Mr. *Spark* makes no claim; the fact of Mr. *Spark* making no claim cannot put Mr. *Hanly* in a better or worse position, and I make the same observation with reference to Mr. *Cropper* and Mr. *Mallett*.

Now it is quite plain that there must be something to limit the construction of a clause such as this; and that it is not everybody who can sue upon it. That proposition of law is clear to my mind from the decision of the Court of Common Pleas in *Wyatt* v. *Metropolitan Board of Works* (1). That clause, as well as the 65th clause of the *Companies Clauses Act* of 1845, no doubt does give rise to an action against a company on the part of someone. The clause, as has been pointed out, does not shew who may sue for expenses, but it does create a statutory liability on the part of the company in whose Act of Parliament it is found to pay according to the section itself. Now, the Court of Common Pleas in the judgment that I am referring to, pointed out the true limits of the section. If Mr. *Hanly's* claim is to be allowed, why cannot the stationers (in the language of Chief Justice *Erle*) who copied out the bill itself—why cannot all persons who performed any of the services which resulted in the passing of the Bill, even the humblest of services, sue? The reason is this: that there would be innumerable sets of claims against the company, and it could not have been the intention of the Legislature to confer a right of action on hundreds of different persons. The construction of the section must have some reasonable limit. Chief Justice *Erle* says (2): "It seems to me that the parties who are liable as the promoters of the Act for the general expenses incurred in soliciting it, are the parties liable to pay those

(1) 11 C. B. (N.S.) 744. (2) 11 C. B. (N.S.) 753.

by whom those expenses were incurred, and that they alone have a claim against the Metropolitan Board of Works in respect of the one sum total under this Act." It is not necessary to say there can only be one claim, but I think, according to that judgment, and according to the judgment of Mr. Justice *Willes*, the only persons who can bring an action on that section are the promoters, whether I am to take them as the promoters technically, that is, the promoters who appear upon the Bill, or, looking behind the Bill, the persons who are in fact the real promoters of the undertaking. Mr. Justice *Willes* in his judgment speaks to the same effect. He says (1): "I think the 'costs, charges, and expenses' in the 56th section, means the costs, charges, and expenses which the persons soliciting the Act would have had to pay if this provision had not been inserted in the Act; and that those are the persons to whom the costs are to be paid by the board." If a right of action was conferred upon Mr. *Hanly*, why was it not conferred upon the engineer? Why was it not conferred upon any number of persons whom I could suggest as standing in a similar position by way of further illustration, if any such were necessary, which is not the case. I consider that I have got clearly from the evidence the fact that Mr. *Hanly* looked to Mr. *Spark*, and to Mr. *Spark* alone, for his remuneration. That being so, I think the case falls within the principle of the decision of the Court of Common Pleas, and also within the decision of the present Lord Justice *Fry* when Mr. Justice *Fry* in the case of *In re Kent Tramways Company* (2), and the principle as laid down by the late Master of the Rolls, Sir *George Jessel*, in the same case. Against these authorities what is there? Mr. *Romer* relied strongly on the decision of Lord *Cairns* and Sir *George Mellish* in the case of *Shaw's Claim* (3). That case requires, I think, the observation, that the only question in it was whether the contributories had not an independent equity against Mr. *Shaw*, who was the claimant. That was the only point which was argued and the only point decided. The liquidator did not appeal, but the contributories said that there was a representation made to them of such a nature that it would be

(1) 11 C. B. (N.S.) 755. (2) 12 Ch. D. 312.
(3) Law Rep. 10 Ch. 177.

C. A.
1888
In re SKEGNESS AND ST. LEONARD'S TRAMWAYS COMPANY.
Ex parte HANLY.
Chitty, J.

violated if the Court allowed Mr. *Shaw* to stand as creditor of the company, and that they would be made to pay contrary to the representation, not directly, but by an indirect process, a sum which, on the equities between themselves and Mr. *Shaw*, they were not liable to pay at all. That was the only point dealt with. But whether the Court would, or not, have held Mr. *Shaw* entitled to sue upon the clause, I am unable to say because that question was not dealt with. The case of *Wyatt* v. *Metropolitan Board of Works* (1), which was, I take it, a well known decision at that time, was not even referred to, and I observe that in the report Mr. *Shaw* is mentioned as a promoter, and it may be that upon that ground it was considered that although he was not a promoter in the technical sense, that is, a person whose name appeared in the Act of Parliament, yet he was substantially one of the promoters, and that consequently he had not done the work on the credit of some other person, but on the facts of the case was simply a person who had done the work with a view only to being paid by the company. I have looked at the special Act of Parliament of 1866 in *In re Brampton and Longtown Railway Company* (2), and I find that *Shaw's* name did not occur in the incorporating section or in the section in which the first directors were named. It may be that in that case it was quite immaterial to the company whether *Shaw* should be admitted a creditor or not, because there may possibly have been some arrangements (whether or not there were I do not know) which rendered it quite immaterial to them; for instance, an arrangement that some other person was entitled to prove, and had given up his right in favour of Mr. *Shaw*. That is speculation, but however that may be, the result is that that point was not discussed, and I should be wrong if I held that there was any intention on the part of Lord *Cairns* or Lord Justice *Mellish* to overrule a previous solemn decision of the Court of Common Pleas, which, to my mind, put a definite and clear construction upon such sections as this which I have to deal with.

Therefore, I say, that whether *Spark* was to be looked upon as a person who could sue or not, or whether *Cropper* and *Mallett* were the only persons who, being named in the Act of Parlia-

(1) 11 C. B (N.S.) 744. (2) Law Rep. 10 Ch. 177.

ment technically as promoters, could sue—taking it either way, Mr. *Hanly's* claim fails. Mr. *Hanly's* only recourse is to Mr. *Spark.*

The claim in respect of the costs of the Act of 1885 was then argued.

Romer, Q.C., and *William Evans*, for Messrs. *C. J. Hanly & Co.*

Byrne, Q.C., and *L. E. Pyke*, for the liquidator.

CHITTY, J.:—

This is a claim by Mr. *Hanly* and a partner of his who acted as parliamentary agents in obtaining a Bill which received the royal assent on the 31st of July, 1885. In December of the previous year a petition was presented to Parliament, and upon that petition proceedings were taken which resulted in the Act I have just mentioned.

Now the claim of the parliamentary agents in this case is founded on contract. There is some argument upon a section similar to that which I have already dealt with, that has scarcely been pursued, but I think it is still open to the Claimants to make any case they can upon that section. The claim, however, as launched, is one of contract, and the contention is of the usual kind—that the parliamentary agents were retained by and on behalf of the company.

Now, reading the bill of costs itself, and reading the correspondence, and having regard also to the evidence of Mr. *Hanly*, and his cross-examination, I think there can only be one conclusion of fact, that Mr. *Hanly* was retained and retained only by Mr. *Spark*, and that he had no retainer from the company. The suggestion, however, is made that the retainer was through the sealing of the petition; and on the evidence as it stands, I take it, and indeed that is not contested on behalf of the liquidator, that that petition bore at the foot of it the seal of the company. The evidence, I say, when examined, results in the proposition that the retainer of the company is shewn by means of the seal being on the petition, and in no other way. That is a fair description of Mr. *Hanly's* own testimony.

C. A.
1888
In re SKEGNESS AND ST. LEONARD'S TRAMWAYS COMPANY.
Ex parte HANLY.
Chitty, J.

Now, was the seal duly affixed? The answer to this question does not involve any matter of nicety at all. The position of the company at the time when the seal was put at the foot of the petition was such that there was no person capable of acting on behalf of the company in affixing it. The Act of Parliament of 1883, under which the company was incorporated, nominated Mr. *Cropper* and Mr. *Mallett* as two of the directors; but under the 36th section it is plain that those two gentlemen alone could not act as directors, and that before they could proceed to do any act whatever which would be binding on the corporation, which, in fact, at that moment was a paper corporation, they must have appointed two other directors, and that admittedly they did not until certain meetings which took place in March, 1885, after the date of the petition. The result was that, as I say, it is not by any critical examination of the circumstances that the Court, acting as a judge of facts, comes to the conclusion that the seal was not duly affixed, but the actual facts of the case are such as to establish beyond controversy that there was no person capable of duly affixing the seal.

Then, looking at the cross-examination of Mr. *Hanly*, I think the facts come out pretty clearly. Mr. *Spark* had got the seal; it was *Spark* who had been consulted with regard to this Bill; it was *Spark* who was asked to supply money—whether he did or did not is not quite clear. And it is just one of those cases of a paper company in which a man who has spent money, as unquestionably *Spark* had, thought (without at all looking at the question from a legal point of view) that he was morally justified in getting hold of the seal; and, if it is necessary to make an inference, I should say the seal was put on by *Spark*, but certainly it was put on without proper authority. I say that because *Hanly*, very properly, in his cross-examination, tells the Court that the seal was handed to him by *Spark* in March, 1885.

The result, therefore, is that the only retainer that is alleged is disproved. There is no pretence of an actual retainer, except the retainer of *Spark*—no retainer by or on behalf of the company. The only ground on which it is attempted to be made out that there was a retainer is because there was a seal which, on the

facts, could never have been duly affixed to the document. Consequently the case on contract fails altogether.

Now there is a point which has been argued, that the company adopted this act, supposed to be done on its behalf, by a resolution that was passed, or which, at any rate, is entered in the books of the company at the end of March, 1885. The entry does not state who were present at the meeting, but it appears that it is denoted to be an extraordinary general meeting of the company, held on this day at the above address, with Mr. *Hanly* himself in the chair. According to the entry there was at least one other director present—whether more I cannot say—and it was "proposed by Mr. *Fellows*, seconded and resolved, that this meeting approves of the Bill (subject to such additional alterations and variations as Parliament may think fit to make therein) now pending in Parliament intituled," and then the title of the Bill is given. It is suggested that the effect of that resolution, which it is said must be held to be duly passed, was to ratify the proceedings in Parliament, and therefore to ratify that retainer of Mr. *Hanly* and his partner as parliamentary agents. But, as was pointed out in argument, the company was then not in a position to hold this, which I presume must have been intended to be the *Wharncliffe* meeting.

It is quite unnecessary to go through the facts in any detail. I refer to the 72nd section of the *Companies Clauses Act*, 1845, which applied to this company, and state, for shortness, that the position of the company in regard to capital was such that not only could it not hold a *Wharncliffe* meeting, but that it could not hold any meeting at all. The result was that it was a mere paper resolution, and not a resolution of the company; and it was not passed at any extraordinary general meeting of the company, because the Act of Parliament which was then in force relating to this company required that there should be present at that meeting persons representing capital in the company to an extent which, on the figures, was quite impossible. In fact, on this part of the case, I may mention that at the time no shares had been subscribed for at all. *Cropper* and *Mallett* were liable for the directors' qualification; but, as I understand the facts, they had not signed any subscription contract. Nobody else had; and

C. A.
1888
In re SKEGNESS AND ST LEONARD'S TRAMWAYS COMPANY.
Ex parte HANLY.
Chitty, J

they were liable for thirty shares a piece, because thirty shares was a director's qualification, and they are named as directors in the Act. On the 28th of March, then, the only two directors were *Cropper* and *Mallett*, and there were only their sixty shares held in the company—not taken, but shares for which they were liable by virtue of the statute—and on that day *Hanly* and *Fisher* were added. Now *Hanly* and *Fisher* did not subscribe for the shares; but they also, by accepting the office of directors, became liable each to thirty shares more. Then one sees how the thing has been worked. On the same day Mr. *Cropper*, immediately after this appointment had been made, resigns, and Mr. *Fellows* comes in his place as director. The result is that now *Fellows* is liable in turn for another thirty shares—not that he has subscribed for them, but he is liable. Then on the 31st of March Mr. *Hanly*, who had acted as parliamentary agent for the first Bill, and the second, and was well aware of the state of this concern, being in the chair, Mr. *Mallett* takes the opportunity of resigning, and his resignation is accepted. Then they are reduced to three directors. That is the only way in which shares could be said to be held by any one at the time when that meeting of the 31st of March took place. It is true that subsequently, by way of remuneration for services in June, 1886, one gentleman, a clerk of Mr. *Hanly* I think, got a single share presented to him by way of remuneration, and another gentleman (I think a solicitor) got three shares on similar grounds. But it was altogether a paper company; and it is just one of those cases, of which I have known in the course of my experience one or two examples before, in which there being an Act of Parliament, certain gentlemen think they may somehow or another take possession of it, and act on behalf of that which is really a paper company. If they do that, they must at least see that they are acting within the scope of the Act of Parliament itself.

The result, therefore, without going further through the case, is that there is no ground for holding the company liable; and I am satisfied that this is not merely a technical point but one founded on justice. It was *Spark* who, having some stake and having spent some money in this concern, thought it would be for the benefit of the company that this new Act of Parliament

should be passed. The argument with regard to the seal falls to the ground. It would be absurd when some person has taken the seal and affixed it without any authority whatever, to say that the company could not repudiate its own seal and is bound by it.

Then it is said that there is a ratification as against the company, because the company took the benefit of the Act. But the Act of Parliament being passed must have its effect. If an Act of Parliament is obtained by any improper means, a Court of Justice cannot say that the Act of Parliament is not binding. I never heard of such a proposition as that the Court could set aside an Act of Parliament because it was fraudulently obtained. The result was that Mr. *Hanly* by his exertions did obtain this Act of Parliament, and no doubt it did apply to this company. That will not make the company liable to pay for the Act of Parliament, and it will not make, of course, a ratification by the company of the supposed retainer. I say it will not make a ratification by the company, because it is not the company that has done it, it is the Legislature that has done it: this sealing is no act whatever by the company. Similar observations apply to the argument, such as it was, that was founded upon this Act of Parliament being found recited in the preamble to a subsequent Act of Parliament. That was the recital of a fact which the company could not deny—there was such an Act of Parliament as was recited.

That, without going through the various other points, appears to me to be sufficient to dispose of the case, except that I will mention, to shew that I have not passed it by, such slight argument as was adduced on behalf of the Claimants with reference to a claim as to payment of the expenses. In this case, of course, with reference to that claim, the promoter must be taken to be the company itself: and that clause would operate therefore as a direction to the company to pay itself the expenses that it had itself incurred in obtaining the Act. In fact, it amounts to a statutory direction, not merely an authority, but a statutory direction to the company to the effect that they may apply, and must apply, a portion of their funds in obtaining the Act. But that would not give a parliamentary agent who had no contract with them, but had a contract with somebody else, as in this

C. A.
1888
In re SKEGNESS AND ST. LEONARD'S TRAMWAYS COMPANY. *Ex parte* HANLY.

case with *Spark*, any right to sue the company. I hold, therefore, that Mr. *Hanly* and his partner have no statutory right by virtue of that clause against the company.

I pass by the question of Mr. *Hanly* being a director and having an interest, because I think what I have stated is sufficient really to dispose of this somewhat bold claim. All that could be said was put neatly and shortly by Mr. *Evans*, but the claims must be disallowed with costs.

C. A.

From these decisions Mr. *C. J. Hanly* and Messrs. *C. J. Hanly & Co.* appealed. The appeal came on for hearing on the 15th of December, 1888.

Romer, Q.C., and *William Evans*, for the Appellants:—

This appeal raises the question whether the Appellants, being parliamentary agents who were employed in obtaining the Acts for the formation of the company, are entitled to be paid by the company when incorporated. We contend that they have that right. It is true that they were appointed by *Spark*, who was the chief promoter of the company, and they have a right to look to him for payment, but that does not negative their right to look to the company: *Tilson* v. *Warwick Gas Light Company* (1); *Hitchins* v. *Kilkenny Railway Company* (2). The parliamentary agents were neither themselves promoters nor were they servants of the promoters. They stood in the same position as solicitors who prepare the Act and incur preliminary expenses. It has been held that they are entitled to look to the company when it is formed: *In re Tilleard* (3); *Manning* v. *London, Worcester, and South Wales Railway Company* (4).

A parliamentary agent is entitled to make a claim for costs and expenses directly against the company if two conditions are fulfilled: (1.) The work must have been done by him as agent and not as a subordinate under the agent; (2.) The claim must be made against a company which has been formed by the exertions of the claimant. *In re Kent Tramways Company* (5) is

(1) 4 B. & C. 962.
(2) 9 C. B. 536.
(3) 3 D. J. & S. 519.
(4) 17 L. T. (N.S.) 68.
(5) 12 Ch. D. 312.

not against us, for the claimant there was a mere clerk, who had acted as a subordinate to a parliamentary agent who was one of the promoters of the company, and the decision was based entirely on that fact.

The Act of Parliament has imposed upon the company a statutory liability to pay somebody, *i.e.*, the parliamentary agent. The reason why a promoter has repeatedly been admitted to prove against the company in respect of services done, is not because he was a promoter, but because he has done service for the company, or paid for the Bill, or something of that kind: *Carden* v. *General Cemetery Company* (1); and a promoter is in no better or more meritorious a position than a parliamentary agent not a promoter, who has rendered services to the company by means of which the company's special Act which calls them into existence has been obtained.

Assuming, then, that the parliamentary agent who has rendered special services is entitled to claim against the company, the liquidator might refuse to admit the claim, either upon the ground that the company has paid for the work within the meaning of the sections applicable, or that the claimant has contracted to save the company harmless in respect of all claims, including his own. But neither of these defences are available in this case. The cases decided under the *Railways Abandonment Act* are in our favour: *In re Kensington Station Act* (2); *Shaw's Claim* (3). And *Wyatt* v. *Metropolitan Board of Works* (4) does not shew the rule, but the exception.

The allowance of our claim would avoid circuity of action, for if we recover against *Spark*, he will be entitled to be indemnified by the company. The Act of 1883 is peremptory; it declares in sect. 72, that "the costs, charges, and expenses of and incident to the preparing, applying for, obtaining, and passing of this Act, or otherwise in relation thereto, shall be paid by the company." This exactly describes the acts which we did, so that there is no doubt that the company is ultimately liable: *Terrell* v. *Hutton* (5).

With respect to the costs of obtaining the Act of 1885, the

(1) 5 Bing. (N.C.) 253.
(2) Law Rep. 20 Eq. 197.
(3) Law Rep. 10 Ch. 177.
(4) 11 C. B. (N.S.) 744.
(5) 4 H. L. C. 1091.

C. A.
1888
In re SKEGNESS AND ST LEONARD'S TRAMWAYS COMPANY.
Ex parte HANLY

claim is still clearer. For the company was in existence when the costs were incurred, and the parliamentary agent was employed directly by the company. It is said that there was no board of directors properly appointed, who had power to bind the company. But the Court cannot look behind the Act. The seal of the company was affixed to the petition, and when the Act was passed the proceedings by which it was obtained must be considered regular and the expenses cannot be disputed.

[They also referred to *In re Birmingham and Lichfield Junction Railway Company* (1), and *Savin* v. *Hoylake Railway Company* (2).]

Byrne, Q.C., and *L. E. Pyke*, for the official liquidator:—

The claim is put upon the statute. But Mr. *C. J. Hanly* never was a promoter of the company, and his conduct shews that he never expected his remuneration from the company, but that he looked throughout to *Spark*, who employed him, both for instructions and for payment.

[LINDLEY, L.J.:—He may have looked to *Spark* for his out of pocket costs, and to the company for his profits.]

He never made any distinction between profits and money out of pocket, but at first, at all events, put his claim upon retainer alone.

[BOWEN, L.J.:—No man who does work on another man's retainer could claim against the company under sect. 72 of the Act of 1883 and sect. 65 of the *Companies Clauses Act*, 1845. The strength of this case on the other side is that the parliamentary agent who claims actually did obtain the Bill.]

Only in the same manner as a solicitor obtains a judgment. Here *Hanly* knew the position of the company. There never was any body of shareholders in existence capable of holding a legal and valid meeting. The total number of shares issued was only 154, and of these 150 were directors' qualification shares. This leaves four shares, of which three were issued to the solicitor and one to the secretary—and in both cases in part payment of moneys due to them. Under the 72nd section of the *Companies*

(1) 28 Ch. D. 652. (2) Law Rep. 1 Ex. 9.

Clauses Act, 1845, shareholders holding not less than one-twentieth of the capital must be present in order to constitute a general meeting, whether ordinary or extraordinary, and the total number of all the shares issued represented less than two-thirds of this one-twentieth, so that no valid meeting of shareholders was possible.

As to the authorities referred to, the question in *Tilson* v. *Warwick Gas Light Company* (1) was whether the true remedy was by action of debt or action on the case, and the question for decision here was never raised. *In re Kensington Station Act* (2) was the case of a claim made upon the deposit, and turned upon the 5th section of the *Railways Abandonment Act*. In *Shaw's Claim* (3) he was a promoter, and had no one but the company to look to. *Wyatt* v. *Metropolitan Board of Works* (4) and *In re Kent Tramways Company* (5) are both authorities in our favour. There may no doubt be a good claim upon the principle of *quantum meruit* in a case where a company after formation take advantage of the services of a person who has procured them their special Act, and has no one else to look to, but here not only has the Claimant *Spark* to look to, but the company, never having been in a position to contract, can neither adopt nor ratify.

W. M. Cann, for Messrs. *Cropper* and *Mallett*.

William Evans, in reply.

1888. Dec. 21. COTTON, L.J.:—

This is an appeal by Mr. *C. J. Hanly* and Messrs. *Hanly & Co.*, who are parliamentary agents, from two separate judgments of Mr. Justice *Chitty* refusing to admit them as creditors in respect of two claims made by them in the winding-up of this company for costs and expenses, first, of forming the company in 1883, and, secondly, of obtaining the Act of 1885. The claims are separate claims, but, as far as the general question is concerned, they both stand in the same position, and I cannot distinguish the one from the other. For, while the question in both claims

(1) 4 B. & C. 962.
(2) Law Rep. 20 Eq. 197.
(3) Law Rep. 10 Ch. 177.
(4) 11 C. B. (N.S.) 744.
(5) 12 Ch. D. 312.

C. A.
1888
In re
SKEGNESS AND ST. LEONARD'S TRAMWAYS COMPANY.
Ex parte HANLY.
Cotton, L.J.

turns on the 65th section of the *Companies Clauses Consolidation Act*, 1845, the question in the first of them turns also upon the 72nd section of the special Act of 1883, and that in the second upon sect. 45 of the special Act of 1885, which is a corresponding section in similar terms to sect. 72. We have not now to consider whether all these costs will come within the description contained in those last-mentioned sections. The only question we have at present to consider is whether the Messrs. *Hanly* can claim at all under those clauses in the winding-up of this company. [His Lordship then stated the facts of the case, and continued:—]

It was argued by the counsel for the Appellants that under a clause like the 72nd of the special Act, or under the 65th section of the general Act, it had been decided that persons who acted as Messrs. *Hanly* did, in performing the work necessary for forming the company and bringing it into existence, were entitled to prove directly as against the company, or to bring an action against the company, if it was not being wound up. And it was thus put: that if anyone not in a subordinate position had been thus working for the company he was entitled under these sections to prove or sue for the costs and expenses of the services of which the company had had the benefit; and that in this case the company had the benefit of the services of the Claimants Messrs. *Hanly*. Now to my mind the authority which rules this case is *Wyatt* v. *Metropolitan Board of Works* (1). In that case, upon the question as to whether a parliamentary agent could prove, we have the considered judgments of the Court of Common Pleas, consisting of Chief Justice *Erle* and Mr. Justice *Williams*, Mr. Justice *Willes* and Mr. Justice *Keating*, who all agreed that a parliamentary agent, employed by someone else to do the work, could not, under a clause in substance the same as that in this case, prove directly or bring an action against the board there designated as the persons to pay for the Act of Parliament. Mr. Justice *Willes* in the course of his judgment says this (2): "The sums mentioned in the 56th section of the Act as the sums to be paid by the Metropolitan Board of Works are 'the costs, charges, and expenses of and incident to the passing of the Act, and preliminary thereto.' At first sight, it would seem that the

(1) 11 C. B. (N.S.) 744. (2) 11 C. B. (N S.) 754.

word 'costs' refers to *legal* costs, and that the person to be paid is the solicitor or the parliamentary agent. In the cases referred to, of *Tilson* v. *Warwick Gas Light Company* (1) and *Carden* v. *General Cemetery Company* (2), the action was brought by the person professionally employed in promoting the Act: but in neither of them was it material to consider the question which is now raised. The declaration in the former of those cases was very like the declaration here: but the objection was not taken. It may be that in that case there was no payment to be made to Mr. *Tilson* by any person in the event of the application proving unsuccessful." That shortly points to what I think is the principle which is to be applied to the present case. Then he goes on: "The Court may be said to have declined to draw the inference that any other person was to pay. Perhaps here we might have assumed from the declaration that another person was liable to the plaintiff for these costs: but the amendment which has been made in the plea puts it beyond doubt that the plaintiff was retained and employed by certain persons, for hire and reward to be paid by them in that behalf, to solicit and obtain the Act, and that the costs in question are due to him from those persons. For the reasons, therefore, given by the Lord Chief Justice, the plea affords a defence to the action. It shews that the persons who would be liable to pay, if the Metropolitan Board of Works did not, are the persons who are entitled to call upon the board. If it were otherwise the inconveniences pointed out by my Lord would necessarily result." Where can you draw the line, if any one who was acting in any way or doing any work or labour in the formation of the company can prove? He continues: "I think 'the costs, charges, and expenses,' in the 56th section, means the costs, charges, and expenses which the persons soliciting the Act would have had to pay if this provision had not been inserted in the Act; and that those are the persons to whom the costs are to be paid by the board." I have read that because it expresses very well the principle on which I think this case is to be decided, viz., that those only who are acting directly for the company which is to be formed, without being employed to do the work by any other persons for hire or reward, are entitled to

(1) 4 B. & C. 962. (2) 5 Bing. (N.C.) 253.

C. A.
1888
In re SKEGNESS AND ST. LEONARD'S TRAMWAYS COMPANY.
Ex parte HANLY.
Cotton, L.J.

look to the company when it is formed for payment out of the fund of any of the costs and expenses which they may incur, and those who are employed by any other person for hire or reward to do the work must look for payment to the person who employed them. But it is said that there was this material difference between that case and the present, viz., that the Metropolitan Board of Works were not a body called into existence by the special Act in that case, and therefore were not persons who got the benefit of the work done by the claimant with regard to the special Act, whereas in this case of the *Skegness Company* the board were persons who had got the benefit of the Claimants' work. But in my opinion that can in the present case make no difference in the construction and effect of the Act of Parliament; although, no doubt, it would have had a bearing upon the question if the company here had in fact taken the benefit of the Act. But in this case, even if such a principle could in any way apply, the company cannot be said to have taken the benefit of the Act. It is true that in one sense it was called into existence by the Act of Parliament, but it never had any existence except upon paper and by Act of Parliament, and it never had any existence for practical working, or did anything towards carrying into effect and availing itself of its statutory powers. There is, therefore, no substantial distinction in that respect from *Wyatt's Case* (1) in favour of the present Appellants, because just as the Metropolitan Board of Works in that case were not called into existence by the special Act, and therefore did not take advantage of the powers thereby conferred, so here this company did not actively take advantage of, or attempt to act on, the powers given by this Act of Parliament. That case, therefore, in my opinion lays down the principle which we ought to follow.

In re Kent Tramways Company (2) is another decision against the Appellants' contention, but that was ingeniously distinguished upon the ground that there the claimant was in a subordinate capacity. But may you not say in this case that the Messrs. *Hanly* were acting in a subordinate capacity? They were not of their own motion acting directly on behalf of the corporation formed or to be formed, but were acting upon the contract

(1) 11 C. B. (N.S.) 744. (2) 12 Ch. D. 312.

entered into by them with *Spark*, who was getting up the company, and employing persons to do what was necessary to carry his object into effect—*i.e.* in a subordinate capacity. And if that is so, I do not see how that argument can assist the Appellants.

But still no doubt there were a certain number of cases cited on which it may be considered possible to lay down the principle contended for. Of these cases, *Tilson* v. *Warwick Gas Light Company* (1) was referred to and distinguished by Mr. Justice *Willes* in *Wyatt* v. *Metropolitan Board of Works* (2). *Hitchins* v. *Kilkenny Railway Company* (3) is simply a case governed by and following *Tilson* v. *Warwick Gas Light Company*, and was decided without argument. In *In re Tilleard* (4) there was no decision on this point, but merely a *dictum*, though one which certainly appears to be in favour of the Appellants' contention. But the facts in that case are somewhat curious. The company had applied for and obtained an order to tax, and the only question was, whether certain costs were properly included in a bill in respect of which a general liability had been admitted. And therefore, however great a respect we may entertain for a *dictum* of Lord Justice *Knight Bruce*, we cannot give effect to it so as to override the careful decision of the Court of Common Pleas in *Wyatt* v. *Metropolitan Board of Works*.

Another of the cases referred to was *Shaw's Claim* (5), but there *Shaw* was not employed by anybody else for hire to do the work, he was acting for the company to be formed in the future as promoter, and unless under this clause he had the right to claim against the assets of the company for the services he had rendered he had no one else to whom he could look or with whom he had contracted for payment.

There is no doubt the case of *In re Kensington Station Act* (6), which arose as to a deposit which had been made and had to be returned as the scheme had come to an end, but this point was not decided, and it was to the interest of the persons contesting

(1) 4 B. & C. 962.
(2) 11 C. B. (N.S.) 744.
(3) 9 C. B. 536.
(4) 3 D. J. & S. 519.
(5) Law Rep. 10 Ch. 177.
(6) Ibid. 20 Eq. 197.

C. A.
1888
In re SKEGNESS AND ST. LEONARD'S TRAMWAYS COMPANY. *Ex parte* HANLY.
Cotton, L.J.

the claim to argue that the remedies of the claimants under the general clause were superseded by the special clause.

The case which has given me the most consideration is that of *Terrell* v. *Hutton* (1). There the company had been formed under one of the old Acts—first provisionally registered and then completely registered—and there was a clause in the deed of settlement upon which the House of Lords decided the question. That clause was as follows: "That a sufficient part of the funds of the company should, upon the complete registration thereof, under the provisions of the said Act of Parliament, be appropriated in payment of the expenses of and incidental to the formation of the company, including those of or having reference to the preparation and execution of that deed, and such complete registration as aforesaid, and every deed of supplement for that purpose." The person raising the claim in that case was in the same position as the Claimants here, but he was employed by persons who were themselves members of the company, and it seems to me that the decision of the House of Lords turned very much upon that. For the grounds of Lord *Cranworth's* decision really were, first, that where in the winding-up of a company it appears that some of the members are liable to pay the parliamentary agents, any liability which they have undertaken for the benefit of the company ought to be provided for in the winding-up; and, secondly, that there the company had actively taken the benefit of the services rendered by the claimants. And it was upon these two grounds that the claim of the appellants in that case was allowed.

But here it is very different. Mr. *Spark*, the only person who really employed Messrs. *Hanly*, never was in any way a member of the company. He was not mentioned in the memorandum of association, and never took any shares, and, as I have already said, beyond coming into a bare existence, the company never did anything—they never actively assumed to themselves any powers or privileges under the Act, and so never had any advantage from Messrs. *Hanly's* services. On that ground, therefore, the claim cannot be supported, and I think Mr. Justice *Chitty* was right in deciding that no proof could be admitted.

(1) 4 H. L. C. 1091.

We must now consider whether there is any difference as regards the claim in respect of the costs of the Act of 1885, because, at the time when the services in respect of that Act were rendered, the company had an actual existence, having been incorporated by the Act of 1883. It was said that these services were rendered under a contract with the company, in order to carry out the directions of the company, and obtain an Act for which the company had applied. But on looking at the facts what do we find? These two gentlemen were named, and others whom they were to name were to be the first directors. But they never did make up the board of directors, and there never was any board of directors which had power to act for and to bind the company or which was capable of exercising any of the powers given by the Act of Parliament—nor was there ever any body of shareholders competent to hold a valid meeting, and in that way to exercise the powers of the company. So the company was really a nothing. It was a name. It had a parliamentary existence, but no corporation capable of acting ever came into existence. In my opinion, therefore, the claim in respect of the costs of the Act of 1885 must stand in exactly the same position as the claim in respect of the costs of the Act of 1883, and the Appellants fail.

LINDLEY, L.J.:—

I have come to the same conclusion.

As regards the claim in respect of the second Act it struck me at first that the company had employed Mr. *Hanly*, and that he was clearly brought within the statutory enactments which were referred to, but when the facts are looked into the case crumbles away. Mr. *Hanly* in his evidence, which appears to be given in an honest and straightforward manner, says that he prepared the petition for leave to bring in the Bill for the second Act upon his own orders, and in another place he says that *Spark* ordered the petition and gave instructions for the second Bill. It is true the petition got sealed, how it did so is obscure, but *Spark* managed it somehow. It really comes to nothing more or less than this, that there was no one to act as the company. *Hanly* knew at least as much as anybody else about the facts, and he handed the

C. A.
1888
In re SKEGNESS AND ST. LEONARD'S TRAMWAYS COMPANY. *Ex parte* HANLY.
Lindley, L.J.

petition over to *Spark's* care; the second claim therefore gives rise to no question other than the general question which arises upon the first Act, and which is no doubt an extremely important one. The importance of this matter to parliamentary agents and to solicitors employed in preparing Bills is very great, and there can be no question that there is a loose idea that such persons can claim and obtain payment from the company under clauses such as these which have been referred to. Now I think we are bound to look very carefully into the authorities. The two statutory provisions on which Messrs. *Hanly* relied are the 72nd section of the special Act of 1883—the 45th section of the special Act of 1885 is in similar terms—and the 65th section of the general Act of 1845. [His Lordship then read the 72nd section, and continued:—] Now that is not the language of the *Companies Clauses Act*, which I will refer to presently. But taking it as it is, what is the effect of it? It is a common form with which we are all familiar, and which has the effect of imposing by statute an obligation upon the company to pay these expenses, but to whom is not said. Now we have to consider who the person is who is to enforce that statutory obligation. Before I go into that I pause to consider the 65th section of the *Companies Clauses Act*, which is in a different form altogether. [His Lordship then read that section, and continued:—] If this question arose now for the first time I am not sure that parliamentary agents and solicitors and other people might not possibly have been held entitled to have the money raised by the company applied in paying their costs and expenses in the manner mentioned in that section. But this 65th section has been in operation ever since 1845, and no construction which goes to that length has been yet put upon it.

Looking now at the authorities, there are first of all the three common law cases of *Tilson* v. *Warwick Gas Light Company* (1), *Carden* v. *General Cemetery Company* (2), and *Hitchins* v. *Kilkenny Railway Company* (3). Those cases settled this, that although the sections and Acts of Parliament upon which they turn (and which are more or less like these) do not designate the

(1) 4 B. & C. 962. (2) 5 Bing. (N.C.) 253.
(3) 9 C. B. 536.

person to whom the payment is to be made, they create a legal obligation to pay, which can be enforced under the old action of debt as distinct from an action on the case. When you look at the pleadings in these three cases, all of which were disposed of on demurrer, you find the plaintiff took care to make sufficient allegations. These allegations were of course admitted for the purpose of argument; and, as was pointed out by Mr. Justice *Willes* in *Wyatt's Case* (1), the question was never raised whether or not the plaintiff was a proper person to institute the action. The result was that in those three cases the plaintiffs succeeded in getting judgment, and that, no doubt, gave rise to the notion that a solicitor or parliamentary agent could recover. That probably accounted for the observations which were made by Lord Justice *Knight Bruce* in *Tilleard's Case* (2), where the company got the order to tax, and that also explains that which evidently I think was the view of Vice-Chancellor *Malins* in *In re Kensington Station Act* (3), although it is very true the question there was not whether the parliamentary agent or solicitor should be paid out of the assets of the company, but whether they could be paid out of the deposit, which turns on the 5th section of the *Railways Abandonment Act.* This has been explained by Lord Justice *Cotton,* but still I think it only right to say that judgment was in favour of the parliamentary agent. When we look further, and come to *Shaw's Claim* (4), we find that the solicitor there was a promoter, that is to say he had no other paymaster to look to. Then there is, I think, nothing else which throws any light upon the subject until *Wyatt* v. *Metropolitan Board of Works* and *In re Kent Tramways Company* (5), which more or less followed it. There the question was really fought. In *Wyatt* v. *Metropolitan Board of Works* the Court of Common Pleas put a construction on these sections which I think must now be taken to be correct, viz., that the persons entitled to sue for the expenses of an Act under the sections, which do not say who is to sue, are the promoters, the persons who are engaged in getting up the Bill, and

(1) 11 C. B. (N.S.) 744.
(2) 3 D. J. & S. 519.
(3) Law Rep. 20 Eq. 197.
(4) Ibid. 10 Ch. 177.
(5) 12 Ch. D. 312.

C. A.
1888
In re SKEGNESS AND ST. LEONARD'S TRAMWAYS COMPANY. *Ex parte* HANLY.
Lindley, L.J.

who have no other paymaster to look to but the company. It struck me at one time that the proper result might be to hold that the object of these statutory provisions was, in the event of the Bill passing, to put the company in the place of the promoters, so that those who were in a position to sue the promoters might sue the company in lieu of the promoters. But it is obvious, when one comes to think of it, that that would be a very unbusiness-like conclusion to come to. Parliamentary agents and solicitors know their own interests far too well to desire to exchange a person who is responsible, for a company formed by Act of Parliament, but perhaps without any funds to pay with. It would never answer their purpose to say "The moment the Bill is passed we look to the company." They do not look to the company incorporated by the Act of Parliament—they look to the funds which that company is to raise, and if, as in this case, the company has got no funds, they would be the very last persons to admit that they had released their hold on the promoters. Therefore that idea will not work, and I do not think is correct in point of law either. Still I have alluded to it because there is a popular opinion that as soon as the company is formed, the company has to pay. Having regard to the reasoning of the Court in the case of *Wyatt* v. *Metropolitan Board of Works* (1) and to the decision of the Court of Appeal in *In re Kent Tramways Company* (2) it appears to me that the only proper solution of this difficulty is to hold that these gentlemen, Messrs. *Hanly*, must look to Mr. *Spark*, and Mr. *Spark* must look for his indemnity to the funds of the company.

I think, therefore, that Mr. Justice *Chitty* was right, and this appeal must be dismissed.

BOWEN, L.J.:—

I am of the same opinion, and after the judgments which have been given it is not necessary for me to go through the cases again, or to shew what has been already shewn, namely, the distinction between the various decisions and the extent to which each goes.

(1) 11 C. B. (N.S.) 744 (2) 12 Ch. D. 312.

This particular point is governed, I think, by *Wyatt's Case* (1), which was decided some thirty-five or thirty-six years ago by a Court of very considerable power and weight, and which has been treated as the law ever since. The Acts of Parliament, the *Companies Clauses Act* in the first place, and the special Act of 1883 in the second place, create a legal liability in the company which can be enforced in an action of debt. But neither of these Acts furnishes us, in express terms, with the key to the question who is the person to take advantage of these clauses, and to enforce the liability of the company. We have, therefore, to go to reason to discover the key to this problem. To whom would you expect that the Legislature intended that these moneys should be paid? It seems to me you would expect the Legislature to say that they were to be paid to the persons who otherwise would go unpaid—who otherwise would have nobody to pay them—and a moment's reflection on the situation will illustrate that further. Down to the time when a railway company's special Act passes the company has not been formed, it does not exist in law, it can have no agents in the strict sense of the word, nobody works for it, nobody is employed for it or on its behalf. It is only a corporation in the future, which does not exist at all until it is created by the statute. Now persons who are working to bring into existence this new and unborn incorporation, who are doing work of which its existence will be the fruit and the result, unless there is some other person to employ them, have got no principal at all, they are agents to nobody.

The object of the Act seems to me to be to place them in the same position after the Act comes into existence as if they had been employed by the company from the first, to enable those who otherwise would have no paymaster to find one in the company as soon as the Act comes into existence. But if there is anyone else to whom they could look for payment the reason of the Act does not apply, and this clause will not avail them. That is the process of reasoning, I think, which is to be found in *Wyatt's Case;* it seems to me to be a sound process of reasoning, and the authority of *Wyatt's Case* would in itself, I think, be

(1) 11 C. B. (N.S.) 744.

C. A.
1888
In re SKEGNESS AND ST. LEONARD'S TRAMWAYS COMPANY.
Ex parte HANLY.

sufficient to induce us to follow it, even if we did not agree with the logic of it, which we do.

The appeal was then dismissed with costs.

Solicitors: *Whitfield & Richardson*; *Irvine & Hodges; Torr & Co.*, agents for *Parker Woodward, Nottingham*; *F. Needham*, agent for *Cann & Son, Nottingham.*

W. W. K.

C. A.
1889
Feb. 28.

DAVIS *v.* STARR.

[1889 D. 103.]

Arbitration Clause—Dismissal of Agent—Action to restrain Dismissal—Motion to stay Proceedings—Common Law Procedure Act, 1854 (17 *&* 18 *Vict. c.* 125), *s.* 11 [*Revised Ed. Statutes, vol. xii., p.* 411].

The Defendant agreed to employ the Plaintiff as his agent for carrying on his business in a specified district for fifteen years: and the agreement contained a clause for referring to arbitration any disputes as to the construction of the agreement, or any payment, act, or thing relating to or arising out of the agreement. Before the term expired the Defendant dismissed the Plaintiff from his employment for alleged misconduct, and gave notice to refer the matters in dispute between them to arbitration, but among the matters in dispute he did not specify his dismissal of the agent. Both parties appointed arbitrators, but before anything more was done the Plaintiff brought an action against the Defendant to restrain him from dismissing him and from appointing another agent. The Defendant moved to stay proceedings in the action on the ground of the agreement to refer all matters to arbitration.

Held, that the Defendant having taken upon himself to dismiss the Plaintiff without waiting the decision of the matters in difference by arbitration, the Court ought not to exercise their power of staying proceedings in the action:—

Held, also, that it was too late after the commencement of the action for the Defendant to withdraw his dismissal of the Plaintiff in order that it might be included in the arbitration.

THIS was an appeal from a decision of Mr. Justice *Kekewich.*

By an agreement made the 2nd of May, 1881, between the Defendant *Richard Benjamin Starr*, the founder of the *Starr Bowkett Building Societies*, and *T. B. Jones* of the second part, it was agreed among other things that the Defendant thereby

appointed *T. B. Jones* his sole agent and representative with full power and authority to establish the said societies in certain counties of *England* therein mentioned, and in *Scotland*, *Wales*, and the *Isle of Man*, during the space of five years, such term to be extended for the further period of ten years as therein mentioned: and the Defendant agreed not to form any such societies in that district except by arrangement with the said *T. B. Jones* and under the terms of the agreement. *T. B. Jones* was to enjoy certain privileges and emoluments by way of remuneration, and was to perform the duties therein specified. The agreement contained a provision for the determination of disputes between the parties by arbitration. *T. B. Jones* died on the 6th of October, 1885. By an agreement dated the 15th of March, 1886, and made between the Defendant *R. B. Starr* of the first part, *Sarah Jones*, the widow and administratrix of *T. B. Jones*, of the second part, *A. J. Read* of the third part, and the Plaintiff *William John Davis* of the fourth part, it was agreed that the Defendant should appoint *A. J. Read* and the Plaintiff joint organizing agents in the districts set forth in the agreement of the 2nd of May, 1881, for the remainder of the term of fifteen years therein specified, with all the privileges and emoluments arising from such appointment, and the Defendant thereby appointed *A. J. Read* and the Plaintiff sole agents for the said districts upon the terms therein expressed. The agreement contained a provision for referring disputes to arbitration in the following terms: "If during the continuance of this agreement, or at any time afterwards, any difference shall arise between the parties hereto, or between one of them and the executors or administrators of either of them, or between their respective executors or administrators, in regard to the construction of any of the agreements herein contained, or to any payment, act, deed, matter, or thing relating to this agreement, or arising therefrom, such difference shall be forthwith referred to two arbitrators, one to be appointed by each party in difference, or to an umpire, to be chosen by the arbitrators before entering on the consideration of the matters referred to them, and any reference shall be deemed an arbitration within the *Common Law Procedure Act*, 1854, and be subject to the provisions as to arbitration contained in the said Act."

C. A.
1889
DAVIS
v.
STARR.

A. J. Read went abroad in the year 1887, and the Plaintiff acted as sole organizing agent for the promotion of *Starr Bowkett Societies* in the districts included in the agreement of the 15th of March, 1886. In the year 1888 the Defendant became dissatisfied with the way in which the Plaintiff conducted his business, and in August of that year gave him notice of his desire to submit his conduct to arbitration. On the 12th of September, 1888, the Defendant wrote a letter to the Plaintiff giving him notice not to act any more as his agent, and soon afterwards he appointed *J. Wilson* to act as his organizing agent in the place of the Plaintiff in part of the districts comprised in the agreement.

The Defendant then appointed an arbitrator on his part, and on the 14th of November he sent to the Plaintiff a statement of his complaints against the Plaintiff which he desired to refer to arbitration, but he did not therein expressly submit to the arbitrators his right to dismiss the Plaintiff from this employment. The Plaintiff also appointed an arbitrator on his part.

On the 14th of January, 1889, the Plaintiff brought an action against the Defendant claiming an injunction restraining the Defendant from forming building societies in the Plaintiff's districts except through the agency of the Plaintiff, and from appointing any other persons to be his agents in the place of the Plaintiff.

On the 20th of February, 1889, the Defendant moved before Mr. Justice *Kekewich* that all proceedings might be stayed on the ground that the parties had agreed that the matters in dispute in the action should be referred to arbitration.

Mr. Justice *Kekewich* refused the application on the ground that there was nothing in the agreement giving the Defendant a right to dismiss the Plaintiff from his employment, and that the right to dismiss him was outside the agreement, and could not be referred to arbitration.

From this decision the Defendant appealed.

Le Riche, for the Appellant:—

The Plaintiff cannot obtain an injunction in this action from the nature of the case. The Court cannot prevent the Defendant from dismissing his agent; he can only claim damages, and they can

be assessed by the arbitrators better than by the Court. We do not say that the jurisdiction of the Court is ousted, but that, the matters in dispute being within the arbitration clause, the Court is bound to let us go to arbitration if we insist upon it: *London, Chatham, and Dover Railway Co.* v. *South Eastern Railway Company* (1). Here all the matters in dispute are within the arbitration clause.

[COTTON, L.J.:—Have you not disentitled yourself to relief by taking the law into your own hands and dismissing the Plaintiff?]

The Defendant gave notice of his desire to proceed to arbitration before he dismissed the Plaintiff. He pursued the proper course in submitting to arbitration the instances of misconduct on the part of the Plaintiff, not the question of right to dismiss. Here misconduct formed the breach of the agreement, and if that question was decided against the Plaintiff the Defendant's right to dismiss him followed as a necessary consequence. It was not intended that the Defendant should ask the leave of the arbitrators before he dismissed the Plaintiff. We rely on *Willesford* v. *Watson* (2); *Pleus* v. *Baker* (3); *Piercy* v. *Young* (4); *In re Mitchell and Izard and the Governor of Ceylon* (5); *Johnson* v. *Shrewsbury and Birmingham Railway Company* (6); *Pickering* v. *Bishop of Ely* (7).

Levett, for the Plaintiff, was not called on.

COTTON, L.J.:—

This is an application by the Defendant to stay proceedings in the action on the ground that there was in the agreement a clause providing for the reference to arbitration of all matters of difference arising out of the agreement. It was pointed out in a recent case (*London, Chatham, and Dover Railway Company* v. *South Eastern Railway Company*) that the *Common Law Procedure Act*, 1854, under which this application is made, does not take away the jurisdiction of the Court to decide the

(1) 40 Ch. D. 100.
(2) Law Rep. 14 Eq. 572; 8 Ch. 473.
(3) Law Rep. 16 Eq. 564.
(4) 14 Ch. D. 200.
(5) 21 Q. B. D. 408.
(6) 3 D. M. & G. 914.
(7) 2 Y. & C. (Ch.) 249.

C. A.
1889
DAVIS
v.
STARR.
Cotton, L.J.

dispute between the parties, but gives power to the Court to stop an action brought in violation of an agreement to refer to arbitration, and to enforce the agreement between the parties. Before that Act was passed it was held that the Court had no power to stay an action brought by either of the parties. It was thought that the Court ought not to enforce an agreement which prevented the parties from having recourse to the ordinary tribunals. The Act was therefore passed to enable the Court to enforce such agreements.

But the question here is: Ought the Court to interfere in this case? In my opinion it ought not. I do not enter into the question whether the Defendant has broken his contract by dismissing the Plaintiff. The Defendant says that a Court of Equity could not prevent him from dismissing his agent. But what was done in this case? In the month of August the Defendant complained of the Plaintiff, and said that he had violated his contract. If there had been no doubt of that he would have been justified in dismissing the Plaintiff from his employment. But there was a dispute about it, and instead of waiting for the decision of the arbitrators whether the Plaintiff had committed the offences charged against him, he takes upon himself to dismiss him and appoints another agent in his place. If he had abstained from dismissing him till the arbitrators had decided the differences between them, or had been willing to withdraw the dismissal till they had decided them, it might have been right for us to stay this action.

[*Le Riche*:—We offered during the argument, and are willing now, to withdraw the dismissal.]

I do not think the Court ought now to accept that withdrawal. The Defendant claimed to exercise his power of dismissal, and there was nothing said in the correspondence about withdrawing it. If before the motion before Mr. Justice *Kekewich* the Defendant had said, "I will withdraw my dismissal and submit everything to arbitration," it would have been different. But what the Defendant said up to the time of the motion was, I assert my power of dismissal and appeal to arbitration only to determine whether there was such a breach of the contract on the part of the Plain-

tiff as to justify the dismissal, and if not, to assess the damages payable to the Plaintiff. Whether the Defendant could have taken the course now proposed before the motion I express no opinion, but certainly it is too late now to do so. In fact the section of the *Common Law Procedure Act* requires that the Defendant at the time of the bringing of the action must have been ready and willing to have the matter referred to arbitration. But here he dismisses the Plaintiff of his own power, and the only question which he wishes to submit to the arbitrators is whether the Plaintiff had committed such breaches as to justify the dismissal. I think it would be wrong in such circumstances to interfere with the Plaintiff's right to bring the matter before a jury, which is a very good tribunal for determining the questions in dispute. The appeal must be dismissed.

LINDLEY, L.J.:—

I am entirely of the same opinion. I think there is a fallacy in Mr *Le Riche's* argument. I have no right to cut a man's throat if I am willing to be hanged for it, nor to dismiss a servant contrary to my agreement if I am willing to pay damages. It seems to me that the Defendant was not ready to submit anything to the arbitrators except only the assessment of the damages, and he was not ready at the time when the action was brought to withdraw his dismissal if the arbitrators ordered him to do so. He is insisting on arbitration in one way, but he is insisting on his own rights in another way. I think the appeal fails.

LOPES, L.J.:—

Under the 11th section of the *Common Law Procedure Act* the Court has power to interfere to stop an action, if it thinks right. Here I think it would not be right; because the Defendant before the action was not ready to refer the whole matter to arbitrators, but only to refer it subject to his right to dismiss, in order that they might assess the damages if they thought the dismissal wrongful. He was not willing to refer it in such a way as to enable the arbitrators to order him to withdraw the dismissal. I said in the course of the argument that any one had a right to dismiss his servant. I ought to have said that every

C. A.
1889
DAVIS
v.
STARR.

one had the power. He has the power subject to an action for damages, if it is wrongfully exercised. I agree that this appeal must be dismissed.

Solicitors: *Bower, Cotton & Bower*, agents for *W. H. Pride, Liverpool*; *Le Riche & Norman.*

M. W.

C. A.
1888
KEKEWICH, J.
Oct. 29, 30.
C. A.
1889
Feb. 28; *March* 1.

LOWTHER *v.* HEAVER.

[1887 L. 3621.]

Building Agreement—Separate Leases—Agreement for Lease—Power of re-entry—Rent in Arrear—Appropriation of Payments—Onus of Proof—Leave to amend.

By a building agreement it was stipulated that as soon as *R.* should have roofed-in the houses to be erected by him on certain plots of ground belonging to *H.*, *H.* would grant and *R.* would accept a separate lease for ninety-nine years, at the rent therein mentioned, of each house when and so soon as the roof was completed, and the plot of ground on which it stood; the leases to be in the form of a draft annexed to the agreement. There was a proviso that the lessor "in respect of any of the plots not previously demised," might re-enter, in the event of the rent being in arrear for twenty-one days, or if at any time the works were not regularly proceeded with for twenty-one days. The form of lease contained a covenant to complete the house within a certain period, and a proviso for re-entry on nonpayment of rent, or breach of covenant, but no power of re-entry was given if the works were not proceeded with for twenty-one days. In June, 1887, *R.* assigned to *L.* the benefit of the agreement as to four houses which he had roofed-in. *R.* died in July, 1887, and after his death building operations stopped for more than twenty-one days. In October, 1887, *L.* brought his action to compel *H.* to grant leases. *H.*, by his defence, denied the right of *L.* to leases, on the grounds that the works had been stopped for more than twenty-one days, and that rent was in arrear:—

Held, that as soon as *R.* had roofed-in a house he was entitled to claim and bound to accept a lease of it, and that his rights and liabilities were the same as if the lease had been granted, and he no longer held the house on the terms of the building agreement, but on the terms of the draft lease, and that as the draft contained no power of re-entry on work being discontinued for twenty-one days, that discontinuance, which did not take place till after the right to a lease had accrued, did not affect that right.

The only evidence on the question whether the rents were in arrear was a statement of account which upon *R.'s* death *H.* sent to his administratrix, and the items in which were admitted to be correct. *H.* had lent considerable sums to *R.*, who also had become indebted to him to a

considerable amount for rent. *R.* had paid on account sums amounting to many times more than the amount of rents, but *H.* appropriated most of them to the loan account, so as to shew *R.* largely indebted on the rent account:—

Held, that it lay upon *H.* to shew that *R.* had not appropriated a sufficient part of his remittances to payment of rent, and that as *H.* had not shewn this, he had not made out that rent was in arrear.

Held, therefore (affirming the judgment of *Kekewich*, J.), that *L.* was entitled to have the leases granted.

L. by his statement of claim alleged that the houses were roofed-in by March, 1887, and *H.* did not by his defence traverse this statement. The evidence at the trial shewed that the main buildings of the houses were completely roofed-in before June, 1887, but the flat wooden roofs of some annexes had up to the time of trial not been covered with zinc. *H.* then applied for leave to amend his defence, that he might contend that the buildings had not been roofed-in within the meaning of the agreement.

Kekewich, J., refused leave, and *held* that *H.* must be bound by his admission on the pleadings, and that the evidence must be disregarded.

Held, on appeal, that as *H.* had been almost constantly on the property about the time of *R.'s* death, and had been perfectly aware of the state in which it was, he ought not now to be allowed to amend for the purpose of taking this point, which he had not thought fit to raise on the pleadings.

Held, also, that the evidence did not shew the houses not to be roofed-in within the meaning of the agreement.

BY an agreement of the 25th of August, 1885, between the Defendant, *Heaver*, a landowner, of the one part, and *John Rowe* of the other part, *Heaver* agreed to grant to *Rowe*, or his nominee or nominees, and *Rowe* agreed by himself or his nominee or nominees to sign, when and so soon as the buildings thereby agreed to be erected should be roofed-in, and within fourteen days after notice of the execution thereof to take up and pay for, the lease or leases of plots of land numbered 205 to 208 inclusive, 182 to 201 inclusive, and 158 to 165 inclusive, delineated on the annexed plan and coloured pink, green, and yellow. *Rowe* was to erect and roof-in by the 25th of December ten houses on ten of the plots, and finish them by the 25th of March then next, erect and roof-in ten more by the 25th of March, 1886, and finish them by the 24th of June, 1886; and erect and roof-in eight more houses and four shops by the 24th of June, 1886, and finish them by the 29th of September, 1886, unless *Heaver* consented in writing to extend the time. Then, after provisions as to the value of the houses, it was stipulated that the leases should be

C. A.
1889
LOWTHER
v.
HEAVER

granted on the terms and conditions therein mentioned, viz., the term to be ninety-nine years from the 24th of June, 1885; the rent, £17 each, for lots 205 to 208, both inclusive, and £7 10*s.* for each of the other lots, except two, which were to be £6 10*s.* each. The first payment of rent as regarded ten plots was to be on the 25th of March, 1886; as regarded ten more, on the 24th of June, 1886, and as to the remaining twelve, on the 29th of September, 1886. Then followed provisions that the ground coloured yellow should not be built upon, provisions as to insurance by *Rowe*, and a stipulation that *Heaver's* title should not be inquired into, and then this clause: "That when and so soon as the lessee shall have roofed-in the said houses to be erected and built by him as aforesaid, the said lessor will grant or cause to be granted, and the lessee or his nominee or nominees will accept, a separate lease of each of the houses so roofed-in, when and so soon as such roof is completed, with the plot or piece of ground upon which the same is built, for the term and at the rents aforesaid." The leases were to be in the form of a draft lease thereto annexed, and signed by the parties. Then followed this provision: "The said lessor in respect of any of the plots not previously demised (without the necessity of bringing any ejectment or instituting any other legal or equitable proceedings, or being in any manner considered or liable as a trespasser) is to be at liberty to re-enter upon and take possession of the premises hereby agreed to be leased, and the buildings (if any) erected thereupon, and to put an end to this agreement in the event of the rents, or any of them, being in arrear for twenty-one days, or if the intended erections and buildings be not commenced on or before the 30th day of August next, and if commenced, they be not at any time regularly proceeded with for the space of twenty-one clear days, or if they be not erected fit for habitation and completely fenced-in and finished on or before the respective times hereinbefore limited for the same respectively, in respect of which several matters time is hereby declared to be of the essence of the contract, or in case the lessee in any particulars shall fail to perform any portion of this agreement, or shall become bankrupt, or shall enter into a composition with his creditors, such power of entry to be without prejudice to any

right of action for damages or otherwise on the part of the said lessor in respect of the nonfulfilment of the terms of this agreement by the lessee."

The land coloured green consisted of the four adjacent lots, 205 to 208 inclusive.

The scheduled form of lease contained a proviso of re-entry for non-payment of rent or breach or default in any of the lessee's covenants. It contained a covenant to complete the house "within the space of —— from the date of these presents," but there was no stipulation corresponding to that in the agreement enabling the lessor to re-enter if the building was not proceeded with for twenty-one days.

Before December, 1886, *Rowe* had completed sixteen houses, of which separate leases were granted to him. About Christmas, 1886, he commenced building four shops on lots 205 to 208. *Heaver*, it appeared, was frequently on the property and knew all that was going on, and though there was no formal extension of time, it was clear upon the evidence that he had waived the conditions as to the times by which the houses must be commenced and finished.

On the 3rd of June, 1887, the Plaintiff advanced to *Rowe* £800, and *Rowe* by agreement in writing of that date declared that the agreement of August, 1885, so far as it related to the four shops, should be a security to the Plaintiff for the £800 and interest, and that the Plaintiff might at any time before the expiration of three calendar months from the date of the agreement purchase the shops for £2800, and in that case the Plaintiff should take the leases direct from *Heaver*. On the 1st of July the Plaintiff advanced *Rowe* £800 more on the security of these shops.

On the 6th of July, 1887, *Rowe* died intestate. After his decease all building operations on the property were suspended for more than twenty-one days. On the 19th of August, 1887, the Plaintiff gave notice to *Rowe's* widow of his intention to exercise his option of purchase. On the 6th of September, 1887, letters of administration to *Rowe's* estate were granted to her.

On the 1st of September, 1887, *Heaver* took possession of lots 205 to 208, and refused to grant leases of them to the Plaintiff.

C. A.
1889
LOWTHER
v.
HEAVER.

The Plaintiff accordingly, on the 26th of October, 1887, commenced this action against *Heaver* and Mrs. *Rowe* asking that *Heaver* might be ordered to execute the leases, and Mrs. *Rowe* to join in them. The statement of claim alleged that the four shops were roofed-in by March, 1887.

Heaver by his defence did not negative the statement that the shops were roofed-in by March, 1887, but he insisted that he was not bound to grant the leases, inasmuch as the rent of these four plots was in arrear from the 29th of September, 1886, and there had been for more than twenty-one days immediately before the death of *Rowe* a failure to proceed with the erection of the buildings on these plots, and the time at which they ought to have been finished had elapsed, and none of them were finished.

In July, 1887, shortly after *Rowe's* death, *Heaver* sent in to Mrs. *Rowe* a statement of the accounts between *Heaver* and *Rowe* down to the 2nd of July, 1887. In this account *Rowe* was charged with ground rent for (*inter alia*) the four plots in question down to that time. The account was in two divisions—one relating to advances made by *Heaver* to *Rowe*, the other relating to ground rents. The total amount charged against *Rowe* for ground rents was £1062, against which *Heaver* gave credit for four acceptances from *Rowe* amounting to £667, leaving a balance of £395. In the other branch of the account *Rowe* was debited with sums amounting to £15,157 for advances and interest, and credit was given to him for thirty remittances at different times amounting to £6865. At the end of this account the £395 from the other account was carried to his debit. This account was put in evidence by the Plaintiff and referred to in the statement of claim as shewing that *Heaver*, by charging rent, had treated *Rowe* as entitled to leases. The correctness of the account as to the amounts carried to the credit and debit of *Rowe* was not challenged, but there was no evidence bearing on the question whether *Heaver* was entitled to appropriate the whole of the £6865 to the loan account.

As regarded the roofing-in of the four shops the evidence of witnesses at the trial went to shew that at the time when the Plaintiff made his first advance in June, 1887, the main buildings (three storey houses) on the four plots were completely roofed-in.

But a projection of one storey in height, forming the front part of the shops, extending about seven feet in front of the main wall, and intended to have a flat zinc roof, was only roofed-in with wood, the zinc not having yet been put on, and it remained in this state when *Heaver* took possession.

The action came on for trial before Mr. Justice *Kekewich* on the 29th of October, 1888.

Barber, Q.C., and *Cree*, for the Plaintiff:—

The Plaintiff has a clear right to leases of such houses as have been roofed-in, and as to which the conditions have been performed. The agreement is divisible as to each plot: *Wilkinson* v. *Clements* (1). No doubt the contract had not been performed exactly within the times limited, but the Defendant *Heaver* allowed this. At the time when the security was given the houses were roofed-in, and the Plaintiff was entitled to leases and the Defendant *Heaver* could not enter.

Warmington, Q.C., and *J. G. Wood*, for the Defendant *Heaver*:—

It is clear on the construction that the power of re-entry came into operation in default of performance of the contract in any part. It is not like the case cited, as the stipulations have not been performed as to these very houses. The plots cannot be separated, and it is not pretended that as to the others the conditions have been complied with. The houses are not roofed-in and the rent has not been paid. The lessor can never have meant to have no remedy except against perhaps worthless plots.

B. B. Rogers, for the administratrix of *Rowe*.

Barber, in reply:—

It is not denied on the pleadings that the houses in question were roofed-in by March, 1887.

J. G. Wood asked for leave to amend on that point, and to state the fact that they were not yet roofed-in within the meaning of the building agreement. The Plaintiff comes here to make out his case and he must have known all about it.

(1) Law Rep. 8 Ch. 96.

C. A.
1889
LOWTHER
v.
HEAVER.

KEKEWICH, J :—

This puts me in a position of considerable difficulty. The rule which I have laid down in many cases has been always to allow any amendment in accordance with the facts at the trial, subject to this, that the Court should see that justice is done between the parties, that is to say, if any one is taken by way of surprise then the amendment must be made upon proper terms, so that the party against whom the amendment is to be made should be protected. On the other hand I have under the *Judicature Act Rules* this principle, which has been found of the utmost importance, that an allegation of fact not denied in the pleadings of the opposite party shall be taken to be admitted. If that is to be departed from you will be thrown back upon a system of pleading as if that rule did not exist. Here I have evidence in cross-examination of the Plaintiff's witnesses and examination-in-chief of the Defendant's witnesses, and some facts distinctly proved which are inconsistent with the case as I find it upon the pleadings, and my disposition would be as far as possible to do that which would enable me to decide according to the real facts, but I think upon the general balance of convenience in the administration of justice that I should adhere to the rule which has been laid down, and that notwithstanding this evidence I ought now to disregard it and to fall back upon the admission and hold the Defendant to it, and therefore not allow him to say at the last moment, when he thinks the rest of his case is not as strong as it should be, that he will take up a different view from that which he did at an earlier stage of the case. I decide the point with great difficulty and considerable hesitation, but I must hold the Defendant to his admission, and that being so I do not wish to hear you Mr. *Barber* upon the rest of the case.

That question of fact being disposed of as admitted, the real point in the case is one of construction. I have to construe a building agreement which is certainly not less difficult of construction than most building agreements. I think that all who have had much to do with such matters know that building agreements generally present difficulties, for this very obvious reason, that they are framed with reference to one set of circumstances

(like wills, which frequently puzzle the Courts) and have to be construed with reference to another set of circumstances. I cannot help remarking that this agreement is not accurately framed, and it is therefore difficult to decide upon it. I must construe it with the decision in the case of *Wilkinson* v. *Clements* (1) before my mind. I entirely accede to the observations upon that case by both Mr. *Warmington* and Mr. *Wood*, that it dealt with a set of circumstances very different from what there is here. I do not, however, think it necessary to say more with reference to that case, than that I find Lord Justice *James* and Lord Justice *Mellish* stating in their own language (more forcible than any I could employ) what is certainly the result of my own experience, that these building agreements are generally framed in order that they may be divisible, and that though the words are with reference to the building of a large number of houses, and the lessor contracts to grant leases of a large number of houses, the leases are generally granted of separate houses as and when completed. Lord Justice *James* states that on page 107 and 108, and Lord Justice *Mellish* at page 111. I refer to this language as embodying what I have observed in the course of my own experience. Therefore, I must approach this agreement as likely to provide for separate leases, and as being therefore a divisible agreement, and I ought not to construe it as an indivisible agreement unless the language forces me to do so. Looking at it, and recognising the difficulty upon it, I am far from finding anything which forces me to construe it as indivisible, and I find more than the balance in favour of a divisible agreement.

In the very first part of the document there is an agreement on the part of the lessor to grant to the lessee or his nominee or nominees, and on the part of the lessee to take, separate leases, and the words are, "when and so soon as the buildings hereby agreed to be erected shall be roofed-in, and within fourteen days after notice of the execution thereof to take up and pay for the lease or leases." It seems to me that, reading those words alone, the proper construction is, that the lessor will grant and the lessee will accept leases of separate houses—not that they are all to be leased when they are all roofed-in, but that as and

(1) Law Rep. 8 Ch. 96.

C. A.
1889
LOWTHER
v.
HEAVER.
Kekewich, J.

when any one is roofed-in the lease shall be granted and accepted. Then immediately follows the provision for the erection of the houses being commenced and carried on up to a certain point within different periods limited with reference to the different plots of land and the houses to be erected thereon, and then comes a further provision as to the leases when and so soon as the lessee shall have roofed-in the said houses, which is really working out in detail one of the provisions with which the document commences. Stopping there, there can be no question whatever (at least to my mind) that a separate lease is to be granted of each building as and when roofed-in. The difficulty occurs upon what has been called the proviso for re-entry. The lessor is given security under that clause for the performance of the agreement, and in words it is so expressed as to be readable as giving to the lessor security on all the property, except the houses which shall have been demised at any time before the security is enforced. That is to say, he is to be at liberty to enter on and take possession of any plots not previously demised by way of forfeiture in order to secure to him the benefit of the agreement. As regards that, it is contended that what is actually demised, and only what is actually demised, is excepted from the operation of the provision, in other words, that although from time to time the lessor might have been (upon the construction which I give the agreement) compellable to grant, and the lessee might have been compellable to accept, leases of separate houses, yet because the parchment has not been engrossed or executed, for convenience, or for some other reason, the lessor might enter upon the land with the houses completed but not actually demised, though upon them the full amount stipulated for had been expended in a workmanlike manner.

There is also a provision for re-entry if the intended erection and building be not commenced on or before the 30th day of August next, upon which nothing turns, but I may mention as regards that, that I do not understand how it fits into the earlier part of the agreement. It cannot matter if all the land, erections and buildings are not commenced by the 30th of August, because the agreement clearly contemplates that they shall be commenced at separate times. The clause says: "If commenced

they be not at any time regularly proceeded with for the space of twenty-one clear days, or if they be not erected fit for habitation and completely fenced-in and finished on or before the respective times hereinbefore limited for the same respectively," yet if the construction which the Defendant submits is correct the buildings might have been roofed-in, and the lease might have been grantable, and the lessee might have been compelled to accept it, and he might have gone on erecting these houses fit for habitation, and yet this clause would apply, and the lessor would be entitled to take possession of the property which he was to have leased some time before. It was with reference to this that I wanted to see the form of lease which was annexed to the agreement, and I find, as I expected to find, that after his lease was granted, the lessee would be under covenant to complete and finish these houses. He is to finish these houses, and he is to do it to the satisfaction of the lessor's surveyor, and there is a proviso in the lease if that covenant is not performed. Everything, therefore, shews to my mind a divisible agreement as to the houses being erected from time to time or roofed-in or finished, and that there might be some of them from time to time in one state, some hardly commenced, some ready to be demised, some actually demised, but not finished and completed. It is said that if one takes that view of the agreement the lessor is deprived of his remedy, and that he might have a large part of the property built on and demised and be left with the other part of the property on his hands, and that the worst part of the property. The answer is that if the landlord thinks that he is not sufficiently secure he must enter at the appropriate moment. He has got a proviso in his hands if he chooses to enforce it, but building owners do not usually enforce their covenants of security, and Mr. *Heaver* did not. He thought that the property would be better with houses built upon it, though not strictly in performance of the covenants. Therefore to my mind the agreement is divisible, and it provides for each house being roofed-in and demisable when roofed-in. I think directly the house was roofed-in to the satisfaction of and in accordance with the terms of the agreement, the lessee was entitled to demand the lease, and from that time forward the

C. A.
1889
LOWTHER
v.
HEAVER
Kekewich, J.

lessor could not enforce as against that particular plot of land with the building thereon the proviso for re-entry which was his security.

As regards the rent being in arrear, I am not satisfied that any rent was in arrear at the time of *Rowe's* death.

The Plaintiff, therefore, in my judgment is entitled to the relief he seeks.

C. M.

C. A.

Heaver appealed from this decision, and the appeal was heard on the 28th of February and the 1st of March, 1889.

J. G. Wood (*Warmington*, Q.C., with him), for the Appellant:—

We ask for leave to amend the statement of defence to make it accord with the facts appearing on the evidence as to the roofing-in of the houses; the statement that the houses were roofed-in by March, 1887, which the Defendant omitted to traverse, being incorrect: *Laird* v. *Briggs* (1).

With respect to the construction of the agreement, we contend that the power of entry remains over the whole plot of ground until the demise of any particular house is actually made, or, at all events, until it is rightfully demanded; then it is, of course, separated from the others. The Judge held that the right of re-entry under the building agreement ceased as to each house as soon as the tenant had a right to ask for a lease, that is, when the house was roofed-in. He relied on *Wilkinson* v. *Clements* (2), but that case is not applicable. This construction is inconsistent with the clause which gives power to re-enter on any plot if the building is not completed within a specified time. Therefore, assuming that the shops in question were roofed-in, the power of re-entry still remained, no lease having been actually granted, and the landlord is entitled to re-enter because rent was in arrear, and there had been a discontinuance of the works for twenty-one days.

Barber, Q.C., and *Cree*, for the Plaintiff:—

It would be inequitable now to admit an amendment as to the time of the completion of the roofing; that was not the ground

(1) 19 Ch. D. 22. (2) Law Rep. 8 Ch. 96.

on which *Heaver* based his claim to re-enter. The Plaintiff advanced money for the completion of the building, and before doing so informed *Heaver* of his intention. The money was spent on the building; but the works were stopped in consequence of the death of *Rowe*. *Heaver* knew the state of the buildings as well as the Plaintiff, but although he made delays and difficulties about granting the lease he never suggested that the Plaintiff was not entitled to one. It is a mere afterthought on his part to allege that the houses were not roofed-in in time. We say that here, as in *Walker* v. *London and North Western Railway Company* (1), the power of re-entry cannot be enforced, as it was applicable only to a state of things which has ceased to exist, the original limits of time having been done away with by the conduct of the parties. The title to leases to these houses having become complete by their being roofed-in they are taken out of the agreement, and the right to leases cannot be defeated by breaches of the agreement as to other plots: *Wilkinson* v. *Clements* (2); *Odessa Tramways Company* v. *Mendel* (3). The *Conveyancing and Law of Property Act*, 1881, s. 14, requires notice to be given before enforcing a right of re-entry for breach of covenant, specifying the breaches of covenant, and no such notice was here given.

B. B. Rogers, for Mrs. *Rowe*:—

Two grounds are alleged for ejecting us: (1.) that rent was in arrear. But the account put in shews that the rent was treated as a mere matter of account between *Heaver* and *Rowe*, who had considerable pecuniary transactions with each other, and *Heaver* cannot after that be heard to allege that rent was in arrear for this purpose. Mr. Justice *Kekewich* came to the conclusion that no rent was due. (2.) Failure to proceed with the works for twenty-one days. I say that the proviso for re-entry under the agreement is not what governs the rights of the parties, but the proviso in the draft lease. The exception from the former of lands previously demised is superfluous unless understood to mean lands as to which no right to a lease has accrued, for if a

(1) 1 C. P. D. 518. (2) Law Rep. 8 Ch. 96.
(3) 8 Ch. D. 235.

C. A.
1889
LOWTHEI.
v.
HEAVER

lease has actually been granted it manifestly takes the lands demised out of the agreement, and is the only instrument regulating the rights of the parties. According to the agreement *Rowe* was entitled to require and bound to accept a lease of each house as soon as it was roofed-in; no notice is required, no application is required, but as soon as a house is roofed-in the parties are under an obligation, the one forthwith to grant and the other forthwith to accept a lease of it. From that moment, therefore, at law as well as in equity, the tenant holds the house under the terms of the draft lease: *Walsh* v. *Lonsdale* (1).

[LOPES, L.J.:—That was approved in *Swain* v. *Ayres* (2).]

Now there is not in the draft lease any right of re-entry for default in working for twenty-one days, so that ground of defence fails. Then as to the houses not having been finished in proper time, all the provisions as to time have been waived. No doubt it was beneficial to *Heaver* to keep *Rowe* at work building on his property, and there was not a stipulation as to time which he did not waive. These four houses were with his privity begun after the time by which according to the agreement they ought to have been finished. If *Heaver* meant to revive the right of binding *Rowe* down as to time he ought to have given a reasonable notice requiring the work to be proceeded with.

J. G. Wood, in reply:—

It was really admitted in the Court below that rent was in arrear, and Mr. Justice *Kekewich's* statement to the contrary, for which he gives no reason, is unaccountable.

[COTTON, L.J.:—Can you insist on forfeiture when you have treated the rent as a matter of account?]

I submit that *Heaver* has not treated it as a matter of account. The rent account is separate from the loan account, and comes to nothing but a demand for rent, giving *Rowe* credit for what he had paid on account. Then as to the necessity of giving notice under the *Conveyancing Act*, *Swain* v. *Ayres* disposes of that.

[LINDLEY, L.J.:—In that case there was no right to specific performance.]

(1) 21 Ch. D. 9. (2) 21 Q. B. D. 289.

The Court did not decide that an agreement for a lease was within sect. 14 even if specific performance would be decreed.

[COTTON, L.J.:—Speaking for myself, I should say that a tenant occupying under an agreement of which a Court of Equity would grant specific performance, has the same rights as if the lease had been granted.]

In *Wilkinson* v. *Clements* (1) the intention to make the agreement severable was much more clear than here. In the present case I contend that the proviso for re-entry is to be taken according to its terms, as applying to all plots of which leases had not actually been granted, so as to operate between roofing-in and the granting of a lease.

COTTON, L.J.:—

This is an appeal by the Defendant, Mr. *Heaver*, against a decision of Mr. Justice *Kekewich* that the Plaintiff was entitled to leases of four plots of land on which buildings had to a certain extent been erected by a builder under a building agreement with Mr. *Heaver*, to the benefit of which agreement the Plaintiff had become entitled so far as regards these four plots.

I will first deal with the question whether we ought to grant leave to the Defendant to amend. It lay upon the Plaintiff to shew that at the time when he asked for the leases the houses had been roofed-in and the roofs completed. It is not disputed that the main building of each house was completely roofed-in, but upon the evidence at the trial it appeared that the roof of a one-storey erection in front of each house, which was intended to have a flat wooden roof covered with zinc, was not finished, the wood work was complete, the planking had been put on over the timbers, but the zinc had not been put on when the Defendant took possession. [His Lordship here went into the evidence, and stated his conclusion to be that the Defendant's contention that the wood work of the flat roof had not been carried over the whole space was not substantiated.] The Plaintiff by his statement of claim alleged that the houses had been roofed-in by March, 1887, and Mr. *Heaver* by his statement of defence did

(1) Law Rep. 8 Ch. 96.

C. A.
1889
LOWTHER
v.
HEAVER.
Cotton, L.J.

not traverse this, so that on the pleadings he must be taken to have admitted it. Then at the trial he asked leave to amend in order to raise this point, that putting on the planking without putting on the zinc to protect it from the weather was not roofing within the terms of the agreement. I think that Mr. Justice *Kekewich* was right in refusing to give him any such leave. Mr. *Heaver* was, at least from June, 1887, residing constantly in the neighbourhood of this property, was frequently seeing it, and knew what the state of it was, and yet when he comes to defend and account for his refusing to grant leases he does not allege that these buildings were not roofed-in as required by the agreement. If in fact they were not roofed-in at the time when he took possession, then the Plaintiff would have no right to have leases granted. Mr. *Heaver* took possession on the 1st of September, 1887, and when leases were asked for he did not say, "You are not entitled to leases because these buildings are not roofed-in as the agreement required." In my opinion, as he has taken that course, and has not referred to want of roofing-in in paragraph 10 of his defence, we ought not to allow him to amend his pleadings in order to raise that question. He must have known the facts, and it must be considered that he determined not to raise as against the Plaintiff the contention that the omission of the zinc prevented what had been done from being a roofing-in under the terms of this agreement.

I will not leave the matter there, because, supposing the amendment made, it would, in my opinion, be wrong on the evidence before us to hold that there had not been a roofing-in within the meaning of the agreement. The roofs of the main building were entirely completed. As regards the annexes, there was put over the whole of them a covering sufficient to protect those parts of the building from the weather, subject only to this, that unless the zinc was put on there would be no protection from the operation of the weather on the wood, or from defects of the wood, which would require repairs or renewing if no zinc was put on. There is a roof, though it is not a perfect roof, not such a roof as any prudent builder would leave to stand the weather for any length of time.

Therefore, in my opinion, the Plaintiff is entitled to leases

unless there has been such a forfeiture under the agreement as prevents him from claiming them. The clause of re-entry in the building agreement provided that "the said lessor in respect of any of the plots not previously demised, without the necessity of bringing any ejectment or instituting any other legal or equitable proceedings" should have a right to re-enter in certain events, one of which was the rent being in arrear, and another was failure to go on with the work for twenty-one days.

As regards the rent, if the Defendant's contention is right that for a long time, even before the buildings were roofed-in, there had been a default in the payment of rent, there would without question be a right of re-entry before the right to have a lease granted accrued to the builder. Now upon this matter the Defendant *Heaver* has not given us evidence which, in my opinion, entitles us to say that the rent was in arrear. He alleges it by his pleadings, but he does not rely on any admission in the pleadings made by the Plaintiff; he relies upon some accounts which have been put in by the Plaintiff, and on an admission by the Plaintiff in cross-examination. Those accounts were rendered by Mr. *Heaver*, after the death of the builder, to the widow of the builder, who is now his personal representative. How does it appear from those accounts that the rent was in arrear? A rent account is made out as against *John Rowe*, the deceased builder, amounting altogether to £1062, which is reduced by payments so as to leave a balance of £395 due from the builder on that rent account. But then there is another account shewing a large number of advances made by Mr. *Heaver* to Mr. *Rowe*, amounting to £15,157, and there are carried to *Rowe's* credit in that account sums amounting altogether to £6865. Sums therefore were carried to *Rowe's* credit which were far more than sufficient to pay off all the sums due for rent. It was contended for *Heaver* that he had a right to appropriate those payments as he pleased. But he has given no evidence of that. Those payments were all made by Mr. *Rowe*, who is dead. Mr. *Heaver* does not tell us whether there was or was not any appropriation by Mr. *Rowe*. If there was, then of course Mr. *Heaver* had no right to appropriate, and it lies on him to shew that Mr. *Rowe* did not send any of those sums which he paid, or those acceptances which he gave, to

C. A.
1889
LOWTHER
v.
HEAVER.
Cotton, L.J.

Mr. *Heaver*, on the terms of their being applied in payment of rent. If any of them were so appropriated, Mr. *Heaver* was bound either to return them or to apply them as Mr. *Rowe* directed. In my opinion, therefore, Mr. *Heaver* has failed to make out that any rent was due in June, 1887. Mr. *Heaver* relied much on the fact that the Plaintiff in cross-examination said that he did not know of any rent being paid after March, 1886. He may not have known it, but, so far as we can see, he was in no way connected with this matter before June, 1887, and that he did not know of the payment of rent is no evidence that it was not paid.

Then as to the default in carrying on the work for twenty-one days. The agreement says that the clause of re-entry is only to apply to plots not previously demised. Is that exception of plots previously demised to be confined to plots in respect of which leases have been actually granted? I think not. The agreement provides that as soon as each house is roofed-in, a lease of it is to be granted by the lessor, Mr. *Heaver*, and is to be accepted by the builder or his nominees, so that as each building is roofed-in, he is bound to accept a lease with all the obligations contained in it; there is a right on the part of the landlord to require a lease to be taken, and a right on the part of the builder to require the lease to be granted to him. Now I am of opinion that the late Master of the Rolls was correct in saying, as he did in *Walsh* v. *Lonsdale* (1), that a tenant holding under an agreement for a lease of which specific performance would be decreed stands now in the same position as if the lease had been granted. He is entitled only in equity it is true to a lease, but being entitled in equity to have a lease granted, his rights ought, in my opinion, to be dealt with in the same way as if a lease had been granted to him, and do not depend upon its actually having been granted. In my opinion as the builder had, in June, 1887, a right to have a lease separately of each of these houses, he from that time held these plots not on the terms of the building agreement, but on the terms of the form of lease, which does not contain any power of re-entry on discontinuance of the works for twenty-one days, and the right to have leases granted is not

(1) 21 Ch. D. 9.

affected by the default to proceed for twenty-one days, such default not having taken place till long after the right to a lease had accrued.

I am, therefore, of opinion that the Plaintiff is entitled to have the leases of these four houses granted to him, and that the judgment of Mr. Justice *Kekewich* must be affirmed.

LINDLEY, L.J.:—

I am of the same opinion. It appears to me that when the case is understood the difficulties which presented themselves vanish one by one.

The first question turns upon the construction of the agreement. The effect of that agreement seems to me to be that Mr. *Rowe* was entitled to have a lease of each house as it was roofed-in, and as soon as it was "roofed-in," whatever "roofed-in" may mean. That right is qualified by this—that there is a proviso for re-entry, which provides that the lessor in respect of any of the plots not previously demised may re-enter in certain events there specified. Mr. *Wood's* argument at first sight is one which requires attention, and is forcible. He says that this proviso means exactly what it says, that until a plot is demised the landlord has a right to re-enter upon it on the happening of any of these events.

But is that the true meaning of this clause? Let us consider how in that case it would work. It appears to me that upon this part of the case the decision of the Court of Appeal in *Wilkinson* v. *Clements* (1) is very important. One knows perfectly well how these building agreements work in practice. One knows perfectly well that they will not work at all unless the builder can go and borrow money upon his buildings as they proceed, and the whole scheme of the working of a building agreement would be upset if a person could not lend money to a builder in the confidence that when the right to obtain a lease accrues he is safe. I regard this expression, "any of the plots not previously demised," as being practically equivalent to "any plots as to which no right to a lease has accrued." If it be not so construed this consequence follows, that the lessor could by

(1) Law Rep. 8 Ch. 96.

C. A.
1889
LOWTHER
v.
HEAVER.
Lindley, L.J.

wrongfully refusing to grant the lease enlarge his own rights. That cannot be. The agreement cannot work unless you say that, from the moment when the right to have a lease has accrued as regards any particular plot, that plot is to be treated as if a lease had been granted. That would make people who deal with builders secure, it would give all reasonable security to the lessor, and would have the advantage of making the agreement practically available, according to the true meaning and intent of all the parties to it.

Then how does the case stand upon the facts? It is for the Plaintiff to prove that these four plots of which he seeks to have leases were roofed-in at the proper time. When I say "proper time" it must be borne in mind that both parties habitually disregarded the time limited by the agreement, and the question really comes to this: whether these plots were, before *Rowe's* death, roofed-in according to the true meaning of that expression in the agreement. So far as the pleadings go the Defendant has admitted that the plots were roofed-in, whatever that means. I should not myself attach very much importance to that if I thought that the admission was a slip or an oversight, but on the evidence we find that the main buildings were completely roofed-in, and that there was nothing wanting except the zinc covering of a small part of the erections, which part had been roofed-in with wood, and when you recollect that Mr. *Heaver* had been himself on the premises daily and knew exactly what the state of affairs was, and when you bear in mind that in his statement of defence he does not say a word about this zinc covering, I am satisfied that, according to the true meaning of the parties, the buildings were roofed-in, or, at all events, if they were not roofed-in, it was for the Defendant to raise that point and prove it, which he did not do.

Ought we, then, to give him liberty to amend in order to raise such a point? I should say unquestionably we ought not. I am satisfied that it is merely an afterthought. It is a mere straw at which a drowning man is catching, and there is no substance in it.

As regards the rent, that is a much more important point. Mr. *Wood* says: "If the rent is in arrear there is power to re-

enter." He says: "There is no question as to the rent being in arrear; no rent ever was paid. Not only is this rent in arrear but it has never been paid at all." That depends upon the evidence. What is the evidence? The evidence is absolutely nothing, except the accounts rendered by *Heaver* to Mrs. *Rowe*. What do they shew? They shew that Mr. *Rowe* was indebted to Mr. *Heaver* to a considerable amount for sums of money from time to time advanced to him, which form the subject of one account, and there is another account in which Mr. *Rowe* is charged half-yearly with rent for these and other plots, the total amount accrued being £1062. They shew further that Mr. *Rowe* paid towards discharge of his liabilities more than £7000. According to Mr. *Heaver's* own account there was £395 due for rent in June, 1887, and the only way in which he makes out that it was due is by assuming that no more than £667 of that £7000 is to be applied to the rent account. Why are we to assume that? It seems to me to be an appropriation of payments which is harsh and oppressive in the extreme. I do not say that Mr. *Heaver* may not have had a legal right so to appropriate them, but if so, he must prove it. The effect of his appropriation, if we are to give effect to it, is to appropriate to ordinary debts the great bulk of *Rowe's* payments, so as to leave the rent unpaid and so entitle *Heaver* to forfeit the whole of this property. If he asks us to uphold that right of appropriation I say it is for him to prove that Mr. *Rowe* never appropriated anything more than £667 to the rent, which is hardly credible. Mr. *Rowe* would have been a madman if he had let this rent accrue, and exposed himself to forfeiture, while he was paying thousands of pounds on the other account. I am not prepared to draw the inference that there was any rent due in June, 1887. I say that the burthen of proof is entirely upon the Defendant to shew that *Rowe's* payments were not appropriated to rent, and he entirely breaks down. That explains what at first sight I failed to follow, why Mr. Justice *Kekewich* said he did not believe that there was any rent due.

I do not think there is any other point except the non-continuance of these buildings for twenty-one days after the death of Mr. *Rowe*. It follows from what I have said that this is imma-

C. A.
1889
LOWTHER v. HEAVER
Lindley, L.J.

terial, because the right to obtain a lease of these plots was prior to the period during which which those twenty-one days were running. Whether, if the default had occurred before the right to leases had accrued, any advantage could have been taken of the clause of re-entry without giving reasonable notice, I doubt very much. The agreement provides that time shall be of the essence of the contract, but time never was the essence of the contract as between these parties. No time was observed. The houses were not begun until when according to the contract they ought to have been finished, and I do not think that the clause of re-entry on default for twenty-one days could have been applied without a notice making time of the essence of the contract.

Under these circumstances it seems to me the appeal fails at all points, and the appeal must be dismissed.

LOPES, L.J.:—

I am entirely of the same opinion, and I have nothing to add.

Solicitor for the Plaintiff: *G. H. Finch.*

Solicitors for Defendants: *Clowes, Hickley & Steward*; *Cree & Son.*

H. C. J.

C. A.
1888
NORTH, J.
Nov. 26, 27, 28, 29.
C. A.
1889
March 4, 5.

PRESLAND *v.* BINGHAM.

[1888 P. 1100.]

Light—Prescription—Fluctuating Interruption—Onus of Proof—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *ss.* 3, 4 [*Revised Ed. Statutes, vol. vii., p.* 224].

In an action for an injunction or damages for interference with the ancient lights of the Plaintiffs' house by raising an old party wall fifteen feet above its original height, the Defendant pleaded that he had for several years been in the habit of piling up empty packing-cases against the wall to a height exceeding the new wall. The evidence was conflicting as to the minimum height of the pile of packing-cases, and as to the time they remained there, but it was proved that they were removed from time to time, some to be returned to the owners, and the rest to be broken up:—

Held (reversing the decision of *North*, J.), that there had been no interruption of the Plaintiffs' enjoyment of light within the 4th section of the *Prescription Act*, and that the Plaintiffs were entitled to an inquiry as to damages.

Per Cotton and *Lindley*, L.JJ.:—*Semble*, if in an action for obstruction

of light it appears on the plaintiff's evidence that there has been some interruption, which in its nature is permanent, the onus is on the plaintiff of proving that such interruption did not in fact continue with his acquiescence for a year; but if the interruption is in its nature fluctuating and temporary, the onus of proving that it in fact continued and was acquiesced in by the plaintiff for a year, lies on the defendant.

THE Plaintiffs were lessees of a house and premises in *College Street, Chelsea,* in which they carried on the business of cockade manufacturers. The business was principally carried on in a workshop built over a yard in the rear of the house, the light to which was provided by two skylights in the roof and a glazed side door. They claimed these skylights and door as ancient lights enjoyed by them and their predecessors in title for more than twenty years.

The Defendant was the occupier of a house and premises adjoining those of the Plaintiffs, and separated by a party wall about eight feet high from the Plaintiffs' workshop. The Defendant pulled down his wall and rebuilt it, and, although warned by the Plaintiffs that they would apply for an injunction to protect their ancient lights, he carried the new wall to the height of twenty-three feet. The Plaintiffs accordingly brought an action against him claiming a mandatory injunction to restrain him from permitting the wall to remain so as to obstruct the Plaintiffs' ancient lights.

The Defendant was a worker in stone and marble, and was in the habit of receiving from *Scotland* and abroad marble packed in wooden boxes or cases, and he pleaded in his defence that he had for many years past been in the habit, continuously and without interruption, of piling up boxes and packing-cases against and above the top of the said wall, to a height exceeding twenty-three feet; and he denied that the new wall had in any way obstructed the light to any of the Plaintiffs' lights.

Much of the evidence at the trial was directed to the position of the skylights, and the right to light through them claimed by the Plaintiffs, and as to the actual diminution of the Plaintiffs' light, which questions do not require a report.

With respect to the interruption of light by the boxes which the Defendant was in the habit of piling up, it appeared that

C. A.
1889
PRESLAND
v.
BINGHAM

there was a heap of stones on the Defendant's side of the wall which reached nearly to the top of the wall, and the boxes were piled on these stones. The Plaintiffs in their evidence swore that the boxes never reached more than three or four feet above the wall, and were cleared away every three months or thereabouts, and whenever they complained of them.

The Defendant in his evidence stated as follows:—

"Some of the cases are returnable—others not. Those returnable are sent away as soon as we get a van load. In the meantime they are placed at the side of the wall; they are not there long; those which are not returnable are broken up into firewood." He also said, "The stack of crates was raised from twenty to twenty-five feet. It was never less than twenty feet high."

Other witnesses for the Defendant said that "the cases rose sometimes twelve or thirteen feet above the top of the wall;" that "there were always some boxes there;" that the witness "had seen boxes twenty-eight feet high very frequently from 1865 till now;" that "they were sometimes twenty-three feet high, but not always;" that "they were from time to time removed and replaced," and "that it was inaccurate to say that they were continuously or uninterruptedly over twenty-five feet high." None of the witnesses on either side could say how long the boxes remained piled up.

The action came on for hearing before Mr. Justice *North* on the 26th of November, 1888.

Cozens-Hardy, Q.C., and *G. B. Freeman*, for the Plaintiffs

Crackanthorpe, Q.C., and *A. àB. Terrell*, for the Defendant.

NORTH, J. (after deciding that the Plaintiffs had satisfactorily proved that they had enjoyed the access of light through their skylights for more than twenty years, and that the light had been materially interfered with by the Defendant's new building, said):—

The next question is as to the effect of this wall of boxes, of which we have heard a great deal, ranged on the Defendant's premises on the top of some stones alongside the wall separating

his yard from the back of the Plaintiffs' premises, upon the top of which stones the empty boxes, crates, or packing cases, or whatever the right term may be, had been raised to a considerable height. The Plaintiffs ask me to ignore this wall of packing-cases altogether, and to grant an injunction on the footing that they have a right to have the light coming to them over the wall as it stood, as if there had been no boxes or cases there at all. It is clear on the evidence, even on the Plaintiffs' evidence, that there were boxes rising to a certain height along that wall, and above it. The Plaintiffs themselves say that they never rose more than (at least they never saw them more than) three or four feet above it. On the other hand, there is evidence produced by the Defendant of there having been a very much greater mass of cases raised there. The evidence is very conflicting, and it is impossible to arrive, from the evidence of the Defendant's witnesses, at the exact state of things, because the story that one tells disagrees very materially with the story told by others. There are one or two witnesses whose evidence I cannot rely upon at all, besides that of the Defendant on which I cannot rely either; but there are several against whom I have not a word to say, excepting that I doubt the accuracy of their recollection, and that they have told stories which are inconsistent with one another. The conclusion I come to is that they do prove that there was an obstruction to a considerably greater extent than is admitted by the evidence of the Plaintiffs; on the other hand I find it utterly impossible to arrive at any line, or at any mark, up to which I could say the Plaintiffs are wrong, and above which I could say the Plaintiffs would be right. No doubt this pile of cases did vary very materially, and I am quite certain that they were very different at one time from what they were at another. Very often, I dare say, they were reduced to nothing, or to next to nothing, as some of the witnesses say, at other times I am satisfied they were existing for a long time to a considerable height, as some of the other witnesses say. And it is to be borne in mind in this case that they were disposed of from time to time, and then piled up again; it is always the upper ones which are taken away first, the lower ones being left.

The Plaintiffs have to make out, to entitle them to relief,

C. A.
1889.
PRESLAND
v.
BINGHAM.
North, J.

that they have enjoyed, to use the words of the Act, "access and use of light to their dwelling-house, workshop, or other buildings, for the full space of twenty years, without interruption." I do not believe that these piles of boxes were there continuously, but on the other hand I am satisfied that they were there from time to time to such a considerable extent that I cannot say the Plaintiffs have established, what they are bound to establish, that they have had without interruption, within the meaning of the statute, the access of the light over the wall of which they speak. Under these circumstances I cannot grant them any relief.

That renders the question of damages immaterial. In any case, in dismissing the action, if I dismissed it with costs, I should say that the Plaintiffs should have all the costs, which are very considerable indeed, of the issue raised with respect to the position of the old window. But in the present case I shall not deal with them in that way. I am so dissatisfied with the Defendant's evidence throughout that I should not be using the discretion I have in a proper way if I allowed him any costs in the action.

The result is that I shall not attempt to apportion the costs in any way, but I dismiss the action without costs.

From this judgment the Plaintiffs appealed. The appeal came on to be heard on the 4th of March, 1889.

Cozens-Hardy, Q.C., and *G. B. Freeman*, for the Appellants:—

We have proved a *primâ facie* case of enjoyment for twenty years, and the Defendant must either prove an existing obstruction at the commencement of our enjoyment or a statutory interruption of our enjoyment during the twenty years: *Seddon* v. *Bank of Bolton* (1). The onus of proving that the interruption lasted for a year is on the Defendant, and the evidence entirely fails on this point. There is no case in which an intermittent interruption like this has been held sufficient under the statute.

[LOPES, L.J, referred to *Davies* v. *Williams* (2)].

(1) 19 Ch. D. 462 (2) 16 Q. B. 546.

Crackanthorpe, Q.C., and *A. à B. Terrell*, for the Defendant:—

We deny that the onus is on the Defendant to prove that the interruption lasted for a year. The Plaintiffs have to prove the user of the easement for twenty years, and then if the Defendant proves an interruption, the onus is on the Plaintiffs to prove that the interruption was only temporary and did not last for a year. If the evidence is uncertain as to the period during which the boxes remained in the yard the Defendant must succeed, because the fact of there being some interruption is established. It is not enough for the Plaintiffs to shew that they had enjoyment twenty years ago, and that they have it now, they must shew continuous enjoyment to satisfy the statute: *Tapling* v. *Jones* (1); *Harris* v. *De Pinna* (2): *Flight* v. *Thomas* (3); *Parker* v. *Mitchell* (4); *Eaton* v. *Swansea Waterworks Company* (5).

[LOPES, L.J., referred to *Glover* v. *Coleman* (6)].

Cozens-Hardy, in reply.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *North*, who dismissed the Plaintiffs' action without costs. He gave no costs on the ground that he thought the Defendant had conducted his case in such a way that he ought not to give him costs, but he dismissed the Plaintiffs' action on the ground that the Plaintiffs had not established their right in such a way as to entitle them to any injunction or damages, in consequence of what they complained of, namely, an interruption caused to the light of a skylight over the workshop by the Defendant raising a wall to something like twenty-three feet high, instead of the old wall which was merely an eight-foot wall. What is relied upon by the Defendant is this. It is proved now as regards the skylight that it is more than twenty years old, and it has been there admitting light to the Plaintiffs' workshop; but it was said, and it is the case, that in order to establish a right of light there must be actual enjoyment for the full period of twenty years

(1) 11 H. L. C. 290.
(2) 33 Ch. D. 238.
(3) 11 A. & E. 688; 8 Cl. & F. 231.
(4) 11 A. & E. 788.
(5) 17 Q. B. 267.
(6) Law Rep. 10 C. P. 108.

C. A.
1889
PRESLAND
v.
BINGHAM.
Cotton, L.J.

without interruption of the access of light. It was said here that on the statement of the Plaintiffs themselves, or on the evidence which we now have before us, there has been interruption, and that all that the Plaintiffs could say was that it could not be shewn that that interruption had been for a year. There was a great deal of argument before us as to what the form of pleadings required, and other matters to which I think it unnecessary to refer; because here we have the evidence, and the question is whether on the evidence there has been any such interruption as is required by the 4th section of 2 & 3 Will. 4, c. 71, that is to say, "That no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made." Now the interruption relied upon by the Defendant as preventing the Plaintiffs from establishing their case was this, that in the yard of the Defendant, who is a stonemason, there had been from time to time the packing-cases in which the marble from *Italy* and the stone from *Belgium* and *Scotland* were brought. Those were packed up behind the party-wall between the Defendant's premises and the Plaintiffs' workshop. They were packing-cases which, it was said, had interfered with the access of light to this skylight. I may say my own opinion is that if it appears upon the evidence of the Plaintiffs that there has been an interruption of a permanent character, one likely in its nature to be of a permanent character, then it would lie on them to shew that it did not in fact last for a year; but if on the evidence it appears that the interruption is one not likely to be of a permanent character, one which from its very nature is not of a permanent character, it lies upon the Defendant, who objects to the light having been gained, to shew by his evidence that there has been an interruption which has been existing and acquiesced in for more than a year.

Now here what is the nature of this interruption? No doubt, the Defendant's witnesses, if they are to be believed, and some of them are to be believed, do say that these boxes were piled up to the height of twenty feet above the ground, or, as others say,

thirteen or fifteen feet above this party-wall, and that they were there always to that height; and they say that the lower tier of the boxes was never removed, although some of the boxes were removed from time to time. That is their own statement. They could only claim the interruption of the light according to the height below which it could be shewn that this wall, or this heap of boxes, never went during one year. In my opinion, having regard to such parts of the evidence as can be relied on, it is impossible to come to the conclusion that there was any such interruption as could have continued for a year. The Defendant gave some evidence as to that; he told us that some of the packages were returnable, some of them were not returnable; then he says, "those returnable are sent away as soon as we get a van-load; in the meantime they are placed on the side of the yard. They are not long there. Those which are not returnable are broken up for firewood." The very circumstance of the object for which the pile of boxes was put up shews that it was not to be considered of a permanent nature, and it was one which it lay upon the Defendant to shew had been a continuous interruption at least for a year, and not one which the Plaintiffs had to shew had not been so long.

In my opinion it was not such an interruption as the Plaintiffs would be called upon to complain of, or be considered as submitting to, if they did not immediately take proceedings in respect of it under the 4th section of this Act, but it was one which from its very nature was only of a temporary nature. That it rose continuously to a height of twenty feet is, I think, an absurdity to suppose, because a certain quantity of the boxes were taken away from time to time by the railway vans, or others were taken away to be sold for breaking up; and when the boxes got down to a certain level I do not think the Defendant would have left the rest there with a chance of their rotting and being worthless even for firewood, but he would have had them all carried away. Therefore, in my opinion, it was not such an interruption as would come within the 4th section, and the defence raised on that ground by the Defendant fails.

The question of damages has not been entered into, but what I think we ought to do is this. We ought to express our opinion

C. A.
1889
PRESLAND
v.
BINGHAM
Cotton, L.J.

that the access of light to the skylight over the workshop of the Plaintiffs has actually been enjoyed for the full period of twenty years before the commencement of this action without any such interruption as is referred to in sect. 4 of the Act. Then we ought to refer it to the Official Referee to ascertain what damage, if any, the Plaintiffs have sustained by reason of the present wall being raised above the height of the old party-wall of eight feet. We should, of course, reserve the costs of that inquiry, but under the circumstances we shall reserve the costs of the action, as well as of the inquiry, until after the report has been made to us. We shall direct the Referee to make the report to this Court, and not to send it back to the Court below.

LINDLEY, L.J.:—

I am of the same opinion. The question raised in this case is unusual by reason of the fluctuating nature of the obstruction, which has been so much discussed. The Plaintiffs have the *onus probandi* upon them. The plaintiff in such an action as this must bring himself within sect. 3 of the *Prescription Act*, and shew that he has enjoyed—not as a right, because that is not in the section—but that he has actually enjoyed the access of light to his old window for twenty years without interruption. That is for him to do. If he proves access of light, and in the course of putting in his evidence there is no sign of any interruption, he has done all that it is *primâ facie* necessary for him to do. If in putting in his evidence it appears there is some material structure which has more or less obstructed his window, it is for him to shew that it has not lasted a whole year. If he shews that there is something like this, a fluctuating obstruction, sometimes high, sometimes low, sometimes none, then it is for the defendant to shew that he has been obstructing for the whole space of twelve months, and that the plaintiff has acquiesced in the obstruction. Now I am satisfied that Mr. Justice *North* gave more credit to the Plaintiffs' witnesses than to the Defendant's, and I am satisfied that the Defendant has greatly exaggerated the nature of the obstruction of the crates. This is a pure question of fact. I do not believe these crates have obstructed the access of light to the Plaintiffs' skylight for a whole twelve

months without any complaint of any sort or kind. I do not believe it. I do not believe they were twenty-three feet high, considering the sort of foundation they had. They were sometimes above the wall, sometimes more, sometimes less, sometimes not at all. That is the inference I draw. I do not think that such an interruption as is referred to in the 4th section of the Act is made out in point of fact. I do not believe it. In all probability there is some loss of light through that skylight. How much, of course I cannot say. There is the evidence of *Presland* and his wife that in point of fact before this wall was up they never had any reason to complain of any obstruction of light to their skylight, and that they could work the press beneath it. Therefore there is a case for inquiry as to damages. Mr. *Cozens-Hardy* does not press us now to grant a mandatory injunction to compel the Defendant to pull down this wall. He asks for damages. I think he is entitled to an inquiry as to damages. The inquiry will be limited to what damages he has sustained by the obstruction of light to that particular skylight by the wall in question. If the result shews that the damages are merely nominal, that will affect the costs, and therefore we reserve the costs of the action and of the appeal until after we know the result of that inquiry.

LOPES, L.J.:—

With regard to these two sections of the *Prescription Act*, sects. 3 and 4, I read these two sections as meaning that there must be twenty years from the commencement of the right to enjoy to the commencement of the action; no interruption is to be considered as an interruption within the meaning of the Act, that is to say, for the purpose of interfering with the twenty years, unless that interruption shall have lasted for one year. The twenty years must elapse, but no interruption is to prevent the twenty years from running unless that interruption has lasted for one year.

Now that being the view I take with regard to the sections, I have to consider what the interruption set up by the Defendant in this case is. I do not propose to deal with the evidence. That has been done already. I will only state that, according to

C. A.
1889
PRESLAND
v.
BINGHAM.
Lopes, L.J.

my view, the interruption set up by the Defendant in this case is fluctuating, uncertain, and intermitting, and I can see no satisfactory evidence which establishes an interruption which has lasted continuously for one year, so as to bring the case within the 4th section of the Act.

A question has arisen during the course of the case as to the burden of proof, I mean whether the Plaintiffs or the Defendant have to make out whether this interruption lasted for a whole year. I do not desire to express any opinion on that subject. It is immaterial to the decision of the present case. I think there is a case made out for an inquiry as to the damages, and that the appeal ought to be allowed.

Solicitors: *J. Rexworthy*; *Cuddon & Co.*

M. W.

C. A.
1889
KAY, J.
Feb. 1.
C. A.
March 6.

In re THE AUSTRALIAN WINE IMPORTERS, LIMITED.

[1888 A. 606.]

Trade-mark—Registration—Similarity to Mark already on the Register—Discretion to refuse to direct Registration—Patents, Designs and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 69, 72, 73—*Costs.*

When an application is made to direct the Comptroller-General of Patents to proceed to register a trade-mark which has been objected to on the grounds of its similarity to a trade-mark already on the register, the Court has a discretion to determine whether it will direct registration, though the case may not be one where the registration is actually prohibited by the *Patents, Designs and Trade Marks Act,* 1883.

O. registered a trade-mark for "spirits" in 1881, and another in 1882. In each there was a representation of a golden fleece, with the words "*Golden Fleece,*" adding in one case the words "*Old Jamaica Rum,*" and in the other "*Pure Old Scotch Whiskey.*" In May, 1887, a company which had been formed in that year applied for registration of a trade-mark for "wines," with the representation of a golden fleece and the words "*Golden Fleece, Australian Champagne, Sparkling Verdeillio.*" *M.*, who was *O.'s* successor in business, opposed the registration:—

Held, that if wines were of "the same description of goods" as spirits within the meaning of sect. 72 (and, *semble,* they were) the registration of the company's trade-mark was prohibited by the Act; but if they were not, still the similarity of the marks was such as, having regard to the similarity of wines and spirits, to be calculated to induce the public to believe the company's wines to be the goods of the same persons as *M.'s*

spirits, and that the Court ought not to direct the company's mark to be registered.

Decision of *Kay*, J., affirmed.

The Court has no jurisdiction to order an unsuccessful applicant for registration to pay the costs incurred by the opponent before the Comptroller.

THE *Australian Wine Importers Company* was incorporated on the 29th of January, 1887, and adopted a trade-mark, consisting of an oblong label, across which ran a diagonal line bearing the words "*Golden Fleece*," such diagonal line being broken by a circle within which was the well-known representation of the golden fleece, a sheep hung up by the middle of its body. On the right-hand top-corner were the words "*Australian Champagne*," and on the left-hand bottom-corner the words "*Sparkling Verdeillio*."

In May, 1887, the company applied to register this label as a trade-mark in respect of "wines," and the application was advertised in the "*Trade Marks Journal*" of December, 1887.

In January, 1888, *J C. Mason* of *London* gave notice to the Comptroller that he objected to the registration, on the ground that he was the proprietor of two trade-marks in class 43, and that the proposed trade-mark, which was also in that class, so nearly resembled his trade-marks that goods marked with it might be taken for his.

One of these two trade-marks had been registered by *Charles Offer* in December, 1881, for "spirits." It consisted of a diamond shaped label, in the centre of which was a representation of the golden fleece, and across it were the words "*Golden Fleece*," "*Old Jamaica Rum*."

The other trade-mark had been registered by *Charles Offer* in January, 1882, for "spirits." It was similar to the other, but instead of "*Old Jamaica Rum*" were the words "*Pure Old Scotch Whiskey*."

It appeared that *Mason*, who had succeeded to the business of *Charles Offer*, sold rum and whisky in bond for exportation under his trade-marks, and that he sold wine in bond for home consumption without any trade-mark.

The company took out an originating summons for directions

C. A.
1889
In re THE AUSTRALIAN WINE IMPORTERS, LIMITED.

to the Comptroller to proceed with the registration. This summons was adjourned to Mr. Justice *Kay* in Court.

The manager of the company, by affidavit in support of the application, deposed that the trade-mark had been used by the company ever since its incorporation, and that no objection had been made to such use by *Mason* or any other person: that at the time when the trade-mark was adopted the deponent was aware of *Mason's* trade-marks, and that in view of their being registered specifically for whisky and rum only the company limited its application for wines only: that the device of the suspended sheep and the words "*Golden Fleece*" were selected as part of the trade-mark "because they were considered as especially appropriate in conjunction with a wine coming from *Australia*, which country being so devoted to wool-growing may be looked upon as 'the land of the golden fleece' of modern times. The company have never used, and do not intend to use, the said trade-mark upon spirits."

The summons was heard before Mr. Justice *Kay* on the 1st of February, 1889.

Renshaw, Q.C., and *J. Cutler*, for the Applicants, cited *Edwards* v. *Dennis* (1), and *Patents, Designs and Trade Marks Act.* 1883, s. 72, sub-s. 2, and s. 73.

Macrory, for *Mason*, was not called upon.

KAY, J.:—

I think that this mark ought not to be registered.

The Comptroller has a very plain duty, which is defined for him by the Act of Parliament. A great many of these cases are continually brought before me in which tradesmen seek to avail themselves of a mark which is upon the register, and has become known in the market as the designation of the goods of a particular firm, by using another mark which is, as nearly as possible, like it and is applied to some similar goods. It seems to me that in all these cases there is a most singular ignoring of the meaning of a trade-mark. What does a trade-mark mean? It means the mark under which a particular individual trades, and which

(1) 30 Ch. D. 454.

indicates the goods to be his goods—either goods manufactured by him or goods selected by him, or goods which, in some way or other, pass through his hands in the course of trade. That is the meaning of a trade-mark. It is a mode of designating goods as being the goods which have been, in some way or other, dealt with by *A. B.*, the person who owns the trade-mark.

Now let me apply that to this particular case. Here there has been upon the register since 1882, the device of a golden fleece with the words "*Golden Fleece*" printed upon it, the device being the usual one of a sheep hanging up by a band passed round its middle, and upon that sheep are printed the words "*Golden Fleece.*" That device, with those words printed upon it, has been registered as the trade-mark of a wine and spirit merchant for spirits only, since the year 1882. I do not know what the fact is, but I will assume for a moment that this wine and spirit merchant has got a well-established business, and that all the world knows that the "*Golden Fleece*" spirits are spirits sold by him.

Another tradesman wants to put upon the register, not an old mark, but a new mark, consisting of a sheep hanging up by a band round its middle, and the words "*Golden Fleece,*" not for spirits, but for wine—that is, for an article in which the tradesman who has already got this mark on the register deals. The meaning and intention of that might be, assuming, as I am for the moment, that the other tradesman who has already got the mark on the register has a large and well-established business—to get the advantage of that well-established business; that is, to make the world suppose or suspect that this wine is wine which has either been manufactured or selected by the man who has been selling the "*Golden Fleece*" spirits; in other words, to get the advantage of another man's trade; to profit by his reputation; to deceive buyers into the belief that the wine sold is wine manufactured or sold by the other merchant. If there is a possibility of that kind of deception the Comptroller ought, in my opinion, to say that the mark shall not come upon the register. It is not at all the same question as though the spirit merchant were now bringing an action against the Applicants to prevent their using the trade-mark. That is quite a

C. A.
1889
In re THE AUSTRALIAN WINE IMPORTERS, LIMITED.
Kay, J.

different matter. Probably he might not succeed: it might be said to him, "You shall not have an injunction; the Court will not interfere by its extraordinary jurisdiction in your favour, because you are only using the mark for spirits": but does it follow that, because he could not get an injunction, the other man is entitled to put the trade-mark upon the register? In my opinion it does not follow at all, and I have said so many times. In my opinion the Comptroller ought to exercise his discretion in a wide and comprehensive way. He is told by sect. 72, sub-sect. 2, that he "shall not register with respect to the same goods or description of goods a trade-mark so nearly resembling a trade-mark already on the register with respect to such goods or description of goods as to be calculated to deceive." Here is a wine merchant who has got a mark on the register with respect to spirits in which he deals; and another wine merchant wants to put practically the same mark upon the register in respect of wine. In my opinion that is eminently calculated to deceive. It is calculated to make anybody who has a strong affection for "*Golden Fleece*" rum or "*Golden Fleece*" brandy believe that the "*Golden Fleece*" wine is wine selected by the same wine merchant.

But there is more in the case than that, because I do not at all agree with the observations addressed to me that sect. 73 does not touch the matter as well. Besides the sheep on these marks, there are the words "*Golden Fleece.*" If the wine merchant who has used the mark which is upon the register has had a very large trade, it is most probable that his goods are inquired for as "*Golden Fleece Brandy,*" "*Golden Fleece Whisky,*" and so on. Sect. 73 says: "It shall not be lawful to register as part of or in combination with a trade-mark any words the exclusive use of which would by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a Court of Justice." The section says, "the exclusive use": so that here, if the exclusive use of the words "*Golden Fleece*" would be calculated to deceive, the Comptroller is directed not to let them be registered as part of the trade-mark. Can anybody doubt that the exclusive use of the words "*Golden Fleece*" with respect to wines would be calculated to deceive if another wine merchant were using the words "*Golden Fleece*" with respect to

spirits? In my opinion it would be calculated to deceive. Therefore, that is another reason why the Comptroller, in my opinion, should not allow the mark to go upon the register. In short, in my opinion, there is no doubt that these sections of the Act of Parliament were intended to prevent people doing what this company is attempting to do.

I refuse the application with costs.

G. I. F. C.

C. A.

From this decision the Applicants appealed. The appeal was heard on the 6th of March, 1889.

Renshaw, Q.C., and *J. Cutler*, for the Appellants:—

By sect. 65 of the Act of 1883, a trade-mark must be registered for particular goods or classes of goods. By sect. 72 the Comptroller is not to register "with respect to the same goods or description of goods" a trade-mark so like one already on the register with respect to "such goods or description of goods" as to be calculated to deceive. The similar enactment in the repealed Act of 1875 (38 & 39 Vict. c. 91), s. 6, used the word "classes" instead of "description." Mr. Justice *Kay* thought that the case came within sect. 73, for that the use of the words "*Golden Fleece*" was calculated to deceive, but *In re Horsburgh's Application* (1) shews that this section refers to the words themselves being calculated to deceive, not to deception being occasioned because they resemble another trade-mark. The case then turns on sect. 72. *Mason* has registered his marks under class 43 (see Trade Marks Rules, 1883, *Sebastian* on Trade-marks (2)), but he has confined them to particular goods, rum and whisky. What we are selling is wine, and wine, though also in class 43, cannot be considered to be goods of "the same description" as rum and whisky. The description of the goods effectually limits the registration, and a trade-mark cannot be misleading because it resembles one used on a distinct description of goods: *Edwards* v. *Dennis* (3). That case also shews that the assignee of a trade-mark has no remedy for an infringement except in respect of the description of goods as to which it has been used, and here

(1) 32 W. R. 530, n. (2) 2nd Ed. p. 357.
(3) 30 Ch. D. 454.

C. A.
1889
In re THE AUSTRALIAN WINE IMPORTERS, LIMITED.

Mason's trade-mark has never been used except as to rum and whisky. Our trade-mark, then, does not come within any of the prohibitions in the Act, and its registration ought not to be prevented.

Macrory, for *Mason*:—

This is not the case of an application to remove a trade-mark from the register as being improperly there, the Court is being asked to interfere for the purpose of putting it there. Now, as was said by Sir *G. Jessel* in *In re Jelley, Son, & Jones' Application* (1), what an honest tradesman would aim at would be to make his mark as distinct as possible from all marks previously on the register. The Applicants admit that they knew of *Mason's* trade-marks, and cannot be supposed to have adopted them except for the purpose of causing a belief that their wine was sold by him. It may be that unless a case is clearly brought within the prohibition of sect. 72, sub-sect. 2, it cannot be removed from the register, but the Court must have a judicial discretion as to whether it shall interfere to help the registration. Even the Comptroller by sect. 62 has a discretion, though it is subject to appeal.

Renshaw, in reply:—

Sect. 72, sub-sect. 2, deals only with the whole trade-mark. Sect. 73 is the only enactment that applies to words forming part of a trade-mark, and it does not touch the present case, there being nothing deceptive in the words "*Golden Fleece.*" The Respondent says we ought to keep our mark distinct from his, and that would be a forcible argument if we were dealing in the same description of goods as his, but they are so distinct that no mistake can arise. If *Mason* were now to apply to register his mark for wine we could oppose the application on the ground that we have used the mark.

COTTON, L.J.:—

This is an application by way of appeal from Mr. Justice *Kay*, on a summons asking for an order directing the Comptroller to

(1) 51 L. J. (Ch.) 639.

proceed with the registration of a trade-mark. There is an opposition by a gentleman who has had ever since January, 1882, two trade-marks of the "*Golden Fleece*," which is part of the trade-mark which the Appellants desire to register, and on his opposition the matter was sent into Court.

I will first refer to the sections of the Act which bear on the case. Sect. 62, which enables the Comptroller to register a trade-mark, begins thus: "The Comptroller may," not must, "on application by or on behalf of any person claiming to be the proprietor of a trade-mark, register the trade-mark." Then sub-sect. 4 gives the Comptroller discretion to refuse to register, such refusal to be subject to appeal to the Board of Trade, and power is given to the Board of Trade to refer the appeal to the Court. That section does not refer in terms to the case of opposition by any one who objects to the registration on the ground that it interferes with any rights of his. I do not say that it does not extend to such a case, but, in my opinion, that is not its primary object. I think it means to say that if the Comptroller should think that the trade-mark is one which, having regard either to sect. 72 or sect. 73 of the Act, or on other grounds, ought not to be registered, then he has a discretion to refuse to register it, means being pointed out by which his discretion can be controlled.

The application to us now is not under that section, but under sect. 69, which applies in terms to an opposition being offered to the registration of the trade-mark. Power is thereby given to any one, within two months after the first advertisement of the application, to send in notice of opposition, and then he puts in a statement, and the applicant may send to the Comptroller a counter-statement. Then, if both parties persist, the Comptroller is to inform the applicant in writing that the person who opposes insists upon his objection, and has given security, and thereupon the case is to be deemed to stand for the determination of the Court. There may be various grounds of opposition, but if the opposition is grounded solely on sect. 72, then all the Court has to decide is whether or not the trade-mark sought to be registered comes within the terms of that section, because, if it does, then the Comptroller cannot register it. The section says, "the Comptroller shall not register," so that such a trade-mark is

C. A.
1889
In re THE AUSTRALIAN WINE IMPORTERS, LIMITED.
Cotton, L.J.

taken out of the possibility of registration. But, in my opinion, there may be other grounds upon which the Court may think that the trade-mark ought not to be registered. I think that sect. 73 does not apply to the present case, because I agree with the view that the words of which that section forbids the registration must be words in which there is some misrepresentation, or words which of themselves are on some other ground disentitled to protection, and does not apply to words which are not objected to on any other ground than that they form part of an existing trade-mark. But though that section does not apply, it furnishes some guide in determining under what circumstances, if there is no prohibition against registration, the Court still ought not to direct the registration, for it prohibits the registration of words which in themselves are deceiving. Then sect. 72, sub-sect. 2, provides that "The Comptroller shall not register with respect to the same goods or description of goods a trade-mark so nearly resembling a trade-mark already on the register with respect to such goods or description of goods as to be calculated to deceive." I think both of those sections point to this, that when the Court has a discretion registration ought not to be ordered if the Court comes to the conclusion that the registration applied for is one calculated to deceive. If the Court decides that the case comes within sub-sect. 2 of sect. 72, then it is not a question of discretion, for the Court has no power to order registration, because the Comptroller, who is the person to register, is in such a case prohibited from registering.

In the present case the Applicants seek to register in respect of "wines" a trade-mark of which a conspicuous part is the "*Golden Fleece.*" The opponent *Mason*, a wine and spirit merchant, is entitled to a trade-mark, registered in 1881 and 1882, which consisted solely of the ram with the golden fleece, and certain words under it. They were registered in class 43 in respect of goods described as "spirits." The present Applicants wish to register in the same class in respect of goods described as "wines," and as in *Mason's* trade-mark there had been a mention of rum and whisky, so in this trade-mark there is a mention of "*Australian Champagne.*" There was a good deal of argument on sect. 72. In the old Act, 38 & 39 Vict. c. 91, s. 6, the

prohibition applied to the registration, with respect to the same goods or "classes of goods," of a trade-mark so nearly resembling a trade-mark already on the register in respect of the same goods or "classes of goods" as to be calculated to deceive; and it was said, very truly, that the substitution of "description" for "classes" shewed an intention of the Legislature to make the prohibition in the present Act of 1883 different from that in the Act of 1875. The alteration was very reasonable, because goods included in the same class may be so unlike each other that no mistake could arise from the similarity of the trade-marks impressed upon them. For instance, class 5 includes all metals; it would therefore include both gold chains and iron plates for iron-clads, and possibly under the Act of 1875 the Courts would have had to hold that even an application to register a trade-mark for gold chains so like one already on the register for iron plates as to be liable to be mistaken for it must be refused. To prevent any such conclusion being come to, I think that the words of the prohibition were wisely altered in the present Act.

Then what we have to consider is this. Is the registration now sought for a registration with respect to the same description of goods with respect to which there has already been a registration of *Mason's "Golden Fleece"* trade-mark? The prohibition is not confined to the same goods, but it is "the same goods or description of goods," and if it were necessary to decide the case on that point, my opinion would be that the goods were of the same description. Wine and spirits are, it is true, different goods. We are not, however, considering here how chemists would describe them, but whether manufacturers and merchants would look upon them as being goods of the same description. They are goods which are generally sold by the same persons, and they are both alcoholic. Although there are differences between them, they may fairly be considered as coming within the expression "the same description of goods." The descriptions of classes in the schedule to the rules are not the descriptions to which we are to refer for the purpose of construing this section, but we are to consider whether, fairly and in a proper sense, these goods are to be considered "the same description of goods." And if it were necessary to decide the point, I should hold that

C. A.
1889
In re THE AUSTRALIAN WINE IMPORTERS, LIMITED.
Cotton, L.J.

the goods were of the same description. I will deal presently with the question whether the new trade-mark is calculated to deceive.

But supposing that the goods are not of the same description, so that the case cannot come strictly within the terms of sect. 72, sub-sect. 2, yet, in my opinion, the Court must have a discretion as to whether, though the registration is not prohibited, it is such a registration as the Court ought not to encourage by directing the Comptroller to go on. In my opinion it is. This company was formed in January, 1887. It applied in May, 1887, for the registration of this trade-mark, and an officer of the company states that before he so applied he knew of the registration of *Mason's* trade-marks, and that he considered that because *Australia* was very much given to the cultivation of wool the "*Golden Fleece*" might be a very proper trade-mark for wine which was made in *Australia*. I do not consider that the "*Golden Fleece*" is so descriptive of *Australia*, or so applicable to what comes from *Australia*, though of an entirely different class from wool, or anything made of wool, that this can be taken as a reasonable explanation of his adopting this trade-mark. Here, although when the company's trade-mark and *Mason's* are looked at side by side one would not hold that they are so alike as to deceive, yet, in my opinion, the use of a trade-mark the prominent part of which is the "*Golden Fleece*," is, as Mr. Justice *Kay* held, calculated to deceive when applied to a description of goods similar to that in respect of which Mr. *Mason* has been using it. It is now two years since this company was formed, and we are told that they have always used this mark though it is not registered, but the matter must be considered now as if we were dealing with the case in May, 1887, when they first applied to have their mark registered. It cannot be said that at that time the company had been so long using this trade-mark that it could be really in consequence of their having used it, and in consequence of their having got a name for their own wine for themselves, that they have applied to register it. In my opinion, whether it is an application for registration in respect of goods of the same description or not, this trade-mark is calculated to deceive, and the use of it can only be accounted for on the

ground that the company, knowing *Mason* to have gained a certain celebrity for a somewhat similar description of goods sold under that trade-mark, desired to get the benefit of his mark which had gained a reputation in the market so far as they could do so, without bringing themselves within the prohibition of the Act, or making themselves liable to be stopped by the Court of Chancery.

I must observe that we are not dealing with the question what we should do if these Applicants, the *Australian Wine Importers Company*, were selling goods with this label, and Mr. *Mason* was applying to restrain them and get an injunction against them. We will deal with that case when it arises. Nothing that I say must be taken to encourage the *Australian Wine Importers Company* to use this mark with the expectation that they will not be prevented. But that is not the question. All that we have to do is to consider whether we by our act are to give the company an opportunity of registering this mark.

A good deal of reliance was placed by Mr. *Renshaw* on *Edwards* v. *Dennis* (1), but that was a very different case. There were there two trade-marks, the owner of one brought an action to restrain the use of his trade-mark by the other, and was met by an application to rectify the register. The plaintiff was assignee of a trade-mark, which was "*Neptune*," and which was registered, in respect of "unwrought and partly wrought metals used in manufacture." He only used one kind of metal and in one particular way, viz., iron for making plates, and the defendant was using another kind of metal in an entirely different way, being a maker of steel wire, and we considered that, as *Edwards* was not manufacturing or selling goods at all resembling those made and sold by the defendant, his trade-mark ought to be restricted to the description of goods on which he was using that mark. But here, although Mr. *Mason* does not in fact use his registered trade-mark in the sale of his wine, yet he is selling both whisky and rum under his trade-marks, and is also selling wine. It would, therefore, be wrong in my opinion to give a sanction to the *Australian Wine Importers Company* by enabling them to register this trade-mark, although they register it, not for that in respect

(1) 30 Ch. D. 454.

C. A.
1889
In re THE AUSTRALIAN WINE IMPORTERS, LIMITED.

of which Mr. *Mason* is using his trade-mark, but in respect of another branch of the trade which he is carrying on, and has been carrying on, since the year 1882. In my opinion, therefore, Mr. Justice *Kay's* order was right, and the appeal ought to be dismissed.

LINDLEY, L.J.:—

The question is whether we ought to grant an order which would compel the Comptroller to register this trade-mark. That depends, of course, upon the statutory rights of the parties. The application was made under certain provisions of the *Patents, Designs, and Trade-marks Act*, 1883, and we must look at those provisions. Supposing there had been no opposition, the Applicants, no doubt, would have obtained registration of their trade-mark as a matter of course, but it was opposed by Mr. *Mason*, who has a trade-mark registered which consists of a sheep slung up by the middle, which is called a "*Golden Fleece.*" Now it is admitted that Mr. *Mason* sells spirits in bond for export with that trade-mark. He is also a wine merchant, and sells wine in bond to exporters and merchants at home, but without that trade-mark. He is a wine and spirit merchant. The characteristic feature of the mark which the company desires to have registered consists of this sheep in the same position slung up, which is familiar to us all as the sign of the "*Golden Fleece,*" and it has the words "*Golden Fleece*" upon it. That is the characteristic portion. The question is whether, having regard to the fact that they are a wine company, and that Mr. *Mason* is a wine and spirit merchant having the trade-mark which I have already mentioned, we ought or are bound to say to the Comptroller, "You must register this mark of the company." It appears to me, I confess, that we ought not to do so, and my reason is this. This fleece has been selected by the company for a purpose, and what is that purpose? It will have the effect if registered of bringing their trade-mark so close to the trade-mark of *Mason* that if it were not for the different subject-matter to which it is to be applied it would be eminently calculated to deceive. But then the company say, "We are only wine dealers," or "We only seek to put this trade-mark upon our

wine bottles or our wine casks, and Mr. *Mason* is only registered in respect of spirits." That brings us to look what the position of the parties is, having regard to sect. 72, sub-sect. 2, which lays a restriction upon what may be registered. That clause says, "The Comptroller shall not register with respect to the same goods or description of goods a trade-mark so nearly resembling a trade-mark already on the register with respect to such goods or description of goods as to be calculated to deceive." These are not the same goods. Wines and spirits are not the same goods. Are they the same description of goods, or are they so near the line as to render it unwise or improper for us to say to the Comptroller, "Register this mark?"

Now for the purpose of deciding whether two sets of goods are of the same description we must not, as it appears to me, lay too much stress on the classification in the schedule to the rules. You find there goods of the same description in different classes, and goods of different descriptions in the same class. For example, if you turn to classes 26–29 you will find that flax and hemp are in one class and jute in another, though all of them are fibrous, and more or less of the same description for trade purposes. Supposing a man who deals in hempen goods and in flax goods to have a trade-mark for flax and hempen goods, it would be a strong thing to register an almost identical trade-mark on the application of somebody else in respect of jute goods. I take it that there you would have the same description of goods within sect. 72, sub-s. 2, although the framers of the rules have classed these things in different classes. Then if you turn to class 22 you will find bicycles and railway carriages in the same class. Now for trade purposes can you have any goods more different than bicycles and railway carriages? Of course they are utterly different things, and yet they are put by the framers of these rules into the same class, so that we cannot be guided by their classification in construing the words "same goods or description of goods" which are the words used in sect. 72. I am not sure that wines and spirits are different descriptions of goods. We must look at the question from a business point of view. They are both alcoholic, and they are generally sold in this country by the same people, and I am not sure

C. A.
1889
In re THE AUSTRALIAN WINE IMPORTERS, LIMITED.
Lindley, L.J.

that they are not the same description of goods. But whether they are so or not it seems to me that they are so uncommonly near the line that we ought not to depart from the view taken by Mr. Justice *Kay*, and say to the Comptroller: "You must register in favour of these wine merchants a mark which is already on the register in favour of a spirit merchant who is also a wine merchant." It appears to me that Mr. Justice *Kay* has taken the right view of the case, and that we ought not to interfere with his order.

LOPES, L.J.:—

Sect. 72, sub-sect. 2, of the Act of 1883 contains a positive prohibition. Now what is the meaning and extent of that prohibition? That prohibition, according to my view, is confined to cases in which the goods are substantially the same, and does not apply to cases of different goods which happen to be brought together in the same class. Whether Australian wines are substantially the same as rum and whisky I doubt, but I prefer not to express any decided opinion upon the matter on the present occasion, because, according to my view, it is not necessary for the decision of this case. That what I have just stated is the true construction of that section, I am led to think from the contrast between the language used in the old Act and the language used in this sub-sect. 2. The prohibition in sect. 6 of the old Act was of a registration in respect of "the same goods or classes of goods." Under sub-sect. 2 it is "with respect to the same goods or description of goods" which makes to my mind a marked difference. I am also led to put that construction upon sub-sect. 2 by reading the form of application, which is this: "You are hereby requested to register the accompanying trade-mark in class [ ] in respect of [ ]." But as I have already stated, it is in my opinion immaterial whether that may be the true construction of that sub-section or not, because the question we have to consider is whether, having regard to all the circumstances, we ought to direct the Comptroller to register this trade-mark? I am clearly of opinion that we ought not. It is a matter of discretion in the Court, and it seems to me impossible, when all the circumstances are considered, to come to any other conclusion but that the

Appellants designedly and deliberately made use of this particular trade-mark in order to lead people to believe that what they were selling was of the same kind or description as that which was being sold by Mr. *Mason*. It appears to me that the course pursued was calculated to deceive. Any kind of trade-mark, any number of trade-marks, any number of devices were open to them, any of which they might have chosen, but for a reason, which to my mind is obvious, they choose this particular trade-mark, and choose it for the purpose of misleading their customers. I think therefore on these grounds that the decision of Mr. Justice *Kay* was right.

Macrory:—I ask for an order for payment of the costs before the Comptroller. The question whether there is power to make such an order has never been decided in Court, though it is said that two Judges in Chambers have decided that there is such a power. By sub-sect. 3 of sect. 69, under which section the present proceedings were commenced, the objector is required to give security for costs before the Comptroller.

[COTTON, L.J.:—How can that give us any power to make the Applicant for registration pay your costs?]

Then sect. 90 empowers the Court to give the costs before the Comptroller on an application to rectify the register.

[COTTON, L.J.:—There is no proceeding here for rectifying the register in any way.]

It may be considered an application to rectify the register by putting the company upon it. But at all events the words at the end of the section are general, and give the Court power as to costs. *In re Brandreth's Trade Mark* (1) under the former Act, is, so far as it goes, against me.

COTTON, L.J.:—

We cannot make any order as to the costs incurred before the matter came before the Court, unless the statute enables us to do so. Sect. 69 only requires the opponent to give security, and does not require any security to be given by the applicant, nor does

(1) 9 Ch. D. 618.

C. A.
1889
In re THE AUSTRALIAN WINE IMPORTERS, LIMITED.
Cotton, L.J.

it say that the applicant shall, if he fails, pay any costs which were incurred by the opponent before the matter comes into Court. If the Taxing-Master says that these are costs incident to the application to the Court we will consider that hereafter, but I cannot on this application express an opinion that they are. Then sect. 90, in my opinion, only applies to the costs of proceedings under that particular section, and it would be wrong to act upon that section in the present proceeding. We are not proceeding under that section. The Respondent might have recourse to it if we had thought we could not exercise our discretion in the way in which we ultimately decided we could. He has not been put to that course by our directing the Applicants' mark to be registered and then leaving it to Mr. *Mason* to move under sect. 90. In my opinion no power is given to us to deal with the costs before the matter came into Court.

LINDLEY, L.J.:—

I am of the same opinion. I do not think either sect. 69 or sect. 90 applies.

LOPES, L.J.:—

I am of the same opinion.

Appeal dismissed with costs.

Solicitors: *E. Salaman: Wyatt & Barraud.*

H. C. J.

BOLTON PARTNERS *v.* LAMBERT.

[1887 B. 270.]

C. A.
1888
KEKEWICH, J.
Dec. 19, 20.
C. A
1889
March 15, 16, 18.

Principal and Agent—Contract by Agent—Ratification—Withdrawal by the other Party before Ratification.

An offer of purchase was made by the Defendant to *S.*, who was the agent of the Plaintiffs, but was not authorized to make any contract for sale. The offer was accepted by *S.* on behalf of the Plaintiffs. The Defendant withdrew his offer, and after the withdrawal the Plaintiffs ratified the acceptance of the offer by *S.* In an action by the Plaintiffs for specific performance of the contract:—

Held (affirming the decision of *Kekewich*, J.), that the ratification by the Plaintiffs related back to the acceptance by *S.*, and therefore the withdrawal by the Defendant was inoperative, and the Plaintiffs were entitled to specific performance.

The fact that a simple acceptance of an offer contains a statement that the acceptor has instructed his solicitor to prepare the necessary documents does not render the acceptance a conditional acceptance.

Crossley v. *Maycock* (1) approved.

THE Plaintiffs, *Bolton Partners (Limited)*, were a limited company incorporated under the *Companies Acts*, and were owners of a factory and hereditaments at *Lavenham, Suffolk*, known as the *Lavenham Sugar Works*, for the residue of a term of ten years from the 25th of March, 1884.

On the 8th of December, 1886, the Defendant, *A. J. Lambert*, wrote to *P. A. Scratchley*, who was then acting as managing director of the company in the absence of the chairman, a letter in which he said:—

"*Re Lavenham Sugar Works.*

"I beg to make you an offer for the above-mentioned works, and at the same time allow me to call your attention to the following facts, which are matters too important to be overlooked on either side."

He then stated several particulars in which expense must be incurred by the purchaser, and proceeded as follows:—

"As it is absolutely necessary to commence the new works

(1) Law Rep. 18 Eq. 180.

C. A.
1889
BOLTON PARTNERS v. LAMBERT.

almost immediately, I propose to take the factory over from the 25th of March, 1887, possession to be given on the 1st of January, 1887, to enable me to get the necessary alterations completed, and also to get the new machinery fixed. Taking into consideration all the facts which I have brought under your notice, I think a fair annual rental to offer you for the use of the factory (including depreciation of the buildings, plant, and machinery) would be £3500, the lease to be the remainder of your term, and subject to the conditions described therein. But as the wall requires repairs, and the machinery, which is now dismantled, will require to be re-started, an allowance of £500 should be made from the first quarter's rent, thus reducing the rent for the first year to £3000, which should be paid on the usual quarter days."

Scratchley wrote to the Defendant on the 9th of December acknowledging the receipt of his letter, and saying that he would refer the matter to the directors.

Scratchley was a member of the works committee, which was appointed by the board of directors. On the 13th of December, 1886, a meeting of the works committee was held at which it was resolved that the Defendant's offer should be accepted, and that a letter should be written to him accordingly, and that the company's solicitor should be instructed to prepare the necessary documents. It was admitted that the works committee had no power to accept the Defendant's offer, or to bind the company by a sale of its property. On the same day, *Scratchley* wrote to the Defendant a letter in which he informed him that the directors accepted the offer contained in his letter of the 8th of December, and that the company's solicitor had been instructed to prepare the necessary documents.

On the 17th of December the Plaintiffs' solicitor sent the Defendant a draft agreement containing certain stipulations not mentioned in the Defendant's offer, and in particular a stipulation as to a guarantee for rent. To these the Defendant objected. After some correspondence the Defendant, on the 13th of January, 1887, wrote to the Plaintiffs withdrawing his offer on the ground that he had been misled by the statements that had been made to him as to the value of the property.

On the 17th of January, 1887, the writ in this action was issued by direction of the board of directors. The Plaintiffs claimed specific performance of the agreement contained in the letters before stated.

On the 28th of January the board of directors held a meeting at which they confirmed the minutes of the meeting of the works committee of the 13th of December, 1886; and *Scratchley's* letter of the same date was also read and confirmed.

The Defendant denied that there had been any complete contract; and contended that after the Defendant had repudiated his offer it was too late for the company to ratify *Scratchley's* acceptance. He also alleged that he had been induced to make the offer by misrepresentation.

The action came on before Mr. Justice *Kekewich* on the 19th of December, 1888.

Warmington, Q.C., and *Chadwyck Healey*, for the Plaintiffs:—

The letters of the 8th, 9th, and 13th of December, 1886, contain a clear and definite contract: *Hussey* v. *Horne-Payne* (1). There was no misrepresentation. The ratification by the board of directors on the 28th of January, 1887, was good, and related back to the date of the original contract; so that the repudiation by the Defendant on the 13th of January, 1887, was of no effect: *Story* on Agency (2); *Bird* v. *Brown* (3); *Ancona* v. *Marks* (4); *Hagedorn* v. *Oliverson* (5); *Routh* v. *Thompson* (6); *Brook* v. *Hook* (7); *Lyell* v. *Kennedy* (8). The issue of the writ was a ratification of the contract by the company.

Brice, Q.C., and *Ribton*, for the Defendant:—

On the evidence there was no concluded contract. It was all negotiation. The letters relied on amounted only to a conditional offer. Formal documents were intended to be prepared: *Crossley* v. *Maycock* (9); *May* v. *Thomson* (10); *Hussey* v. *Horne-Payne*. It was open to the Defendant to withdraw his offer

(1) 4 App. Cas. 311.
(2) 9th Ed. §§ 239, 240, 242.
(3) 4 Ex. 786.
(4) 7 H. & N. 686.
(5) 2 M. & S. 485.
(6) 13 East, 274.
(7) Law Rep. 6 Ex. 89.
(8) 18 Q. B. D. 796.
(9) Law Rep. 18 Eq. 180.
(10) 20 Ch. D. 705.

C. A.
1889
BOLTON PARTNERS v. LAMBERT.

before acceptance by the company. Therefore the attempted ratification by the company after distinct repudiation by the Defendant, was *ultrà vires*, and came too late: *Lee* v. *Soames* (1); *Dickinson* v. *Dodds* (2); *Bird* v. *Brown* (3); *Brewer* v. *Broadwood* (4); *Ancona* v. *Marks* (5). If there is a contract, it was induced by the misrepresentations of the company's agents.

Warmington, in reply.

KEKEWICH, J.:—

I have three questions to consider. First, whether there ever was a completed contract between the parties; secondly, whether the contract was obtained by misrepresentation on the part of those seeking to enforce it; and, thirdly, was it, as it has been said to be, *ultrà vires*. I use that last phrase because it has been used in argument, and not because it is perhaps the most happy way of expressing the point which I have to consider. As regards the first question it is, of course, one of mixed law and fact; that is to say, it depends largely on documents, supplemented to a small extent by oral evidence. I am to consider this question with direct reference to the doctrine laid down by the House of Lords in *Hussey* v. *Horne-Payne* (6), which is shortly this. Where you have a contract in letters or other such like documents, that is to say, not reduced into a document of legal form; you are bound to look, not only at what occurred before—what led up to the contract—but also at what occurred afterwards, with regard to the contract, in order to determine the question whether there was a completed contract, or whether the parties were in truth only negotiating. *Hussey* v. *Horne-Payne* is, of course, binding upon me, and states the law of the Court in such cases, but there is one remark upon it which I think has escaped the notice of the Defendant's counsel, and which, so far as I am aware, has not been specifically mentioned in any other case, and that is this—that the qualifying effect to be attributed to what passed, both before and after the alleged

(1) 36 W. R. 884.
(2) 2 Ch. D. 463.
(3) 4 Ex. 786.
(4) 22 Ch. D. 105.
(5) 7 H. & N. 686.
(6) 4 App. Cas. 311.

contract, must be to some extent dependent on the question whether the documents relied upon by the plaintiff—the party seeking specific performance—do or do not by themselves constitute a complete contract. It is quite true that in *Hussey* v. *Horne-Payne* (1) it was held that the doctrine is—you are to look at the antecedent and subsequent communications between the parties, whether there was a complete contract effected by the correspondence or not, but in that particular case Lord *Cairns*, who as Lord Chancellor moved the judgment of the House, distinctly expresses his view that there was not a complete contract on the letters which were relied on, and Lord *Selborne*, who was the only other learned Lord who addressed the House at length, does not express any different opinion. I certainly conclude from what Lord *Cairns* says, and I certainly should hold independently, being at liberty to do so, that you would attribute a very different effect to communications before and after the alleged contract, where that alleged contract is not complete, or is at any rate of a doubtful character. I think it, therefore, first, my duty to look at the alleged contract in this case before I attribute any qualifying effect to the communications before and afterwards. [His Lordship then considered the two letters of the 8th and 13th of December, 1886, and held that they contained a distinct offer by the Defendant and acceptance by Mr. *Scratchley* on behalf of the Plaintiffs, and that there was nothing in the previous or subsequent negotiations to displace this view. His Lordship also held, on the evidence, that there had been no misrepresentation on the part of the Plaintiffs, and continued:—] There is one other point. It is said that this contract is *ultrà vires*. Mr. *Scratchley* was only the agent for this purpose, in the first instance, of Sir *Francis Bolton*, the chairman of the company. *Scratchley* purported to act on behalf of the company. He himself had no authority as a director at all. Sir *Francis Bolton* as chairman, I apprehend, had no authority to sell this property unless it was delegated to him by the board. There was a works committee which passed a resolution, on the authority of which Mr. *Scratchley* acted. Counsel have not thought it worth while to shew the constitution of the works committee, and I take it

(1) 4 App. Cas. 311.

C. A.
1889
BOLTON PARTNERS v. LAMBERT.
Kekewich, J.

for granted that the works committee had no authority to bind the company to sell. Therefore it may be taken that it rests entirely with the board of directors, and they did not confirm this contract until after the 13th of January, 1887, when Mr. *Lambert* repudiated it. They did so then. Later on the action was commenced by the company, in the name of the company, and from that time forward it was the contract of the company, and the question must be whether the company have power to enforce the contract entered into on their behalf. About that I have no doubt at all. Apart from anything else, to my mind subsect. 1 of sect. 3 of the memorandum of association puts that beyond doubt. But the argument as to *ultrà vires* was of a different character. It is said that the contract cannot be enforced on the ground of want of mutuality, that is, that inasmuch as the company were not bound at any time before the 13th of January, 1887, Mr. *Lambert* cannot now be compelled to perform the contract he had entered into with them through their unauthorized agent. As regards the doctrine of mutuality I have had to consider it many times. I am always afraid of quoting my own decisions, I do not think it is the right thing for a Judge to do, but I often do refer to them when I can thereby avoid repeating in different words what I have said before. I see that in the case of *Lee* v. *Soames* (1), I did refer to the doctrine, and to the cases on the subject, and I did so even more fully in the case of *Wylson* v. *Dunn* (2), where my view of the doctrine of mutuality is stated with express reference to the judgments of the Master of the Rolls in *Forrer* v. *Nash* (3), and Lord Justice *Fry* in *Brewer* v. *Broadwood* (4). But the question here is, what is the value of want of mutuality as regards a case of this kind. Why should Mr. *Lambert* be now entitled to get off his bargain because at that time the company was not strictly bound? Mr. *Lambert* does not seek to get off his bargain on that account. He repudiates it on entirely different grounds, and long before he set up this point of *ultrà vires* the company had adopted the contract made on their behalf and had taken proceedings, and had waived any right they might have had as against him to resist specific performance of it, if he had

(1) 36 W. R. 884.
(2) 34 Ch. D. 569, 576, 577.
(3) 35 Beav. 167.
(4) 22 Ch. D. 105.

taken proceedings. On what possible ground therefore can he now complain that he is compelled to perform a contract which he had entered into with the Plaintiffs? The contract was with them. It seems to me an entirely different case from those where the original contracting party was incapable of performing. The company were capable, I so hold, from the very first, and immediately they come forward and adopt the bargain, the original alleged incapacity is completely set right by their waiver. Then comes in, it seems to me, the doctrine which was elaborated by Mr. *Warmington* in his opening with reference to many cases to which I will only refer *en bloc*, namely, the doctrine of ratification. The doctrine of ratification is this, that when a principal on whose behalf a contract has been made, though it may be made in the first instance without his authority, adopts it and ratifies it, then, whether the contract is one which is for his benefit and which he is enforcing, or which is sought to be enforced against him, the ratification is referred to the date of the original contract, and the contract becomes as from its inception as binding on him as if he had been originally a party. That doctrine, combined with the one in respect of mutuality, the limits of which I have already stated, seems to me to get rid entirely of the third objection on the ground of *ultrà vires*, and to dispose of this case. There must, therefore, I think be judgment for specific performance. Even before the *Judicature Act* in many cases, and certainly since, it has been the practice of the Court to order a lessee in an action for specific performance to pay the rent which he ought to have paid, if the lease had been prepared, engrossed and executed so as to make the term run from the time originally agreed. There is no difficulty, therefore, about payment of the rent. That is part of the judgment for specific performance, and not an accessory by way of damages, as was pointed out, I remember very well, in one case by Lord Justice *James*. As the company will get their rent of £3500 a year—and I note it ought to have been paid quarterly—I cannot see how they are entitled to any damages for the non-performance of the contract, except perhaps this, that if the natural consequence of their having had £3500 a year payable quarterly would have been that they would have had money which would have carried interest, and as I give

BENGAL SECRETARIAT LIBRARY

C. A.
1889
BOLTON PARTNERS v. LAMBERT
Kekewich, J.

a judgment for the payment of a sum of money, I am entitled as a jury, or as a Judge, to give by way of damages interest on the sums of money which ought to have been paid—certain sums on certain days—and damages to that extent I have no difficulty in awarding. Damages beyond that I do not at present see. This, however, does occur to me. The company were bound as vendors, because they were in the position of vendors, to maintain the property for the benefit of Mr. *Lambert*, their purchaser. That has been settled now by many cases, notably by *Phillips* v. *Silvester* (1); *Earl of Egmont* v. *Smith* (2). They are bound to maintain the premises on the footing that they are trustees of the property, though not in the fullest sense, for the purchaser; and as they are trustees with that obligation to maintain, it seems to me that, where they have had to pay money out of their own pocket which is entirely unremunerative to them, they have a claim against the purchaser in respect of money so expended, and if it is thought worth while I should be prepared to direct an inquiry as to the money so expended, and the extent of the liability of the Defendant to recoup them any such expenditure. If that is not asked I should not go beyond specific performance of the agreement, the execution of the proper lease, to be settled by the Judge in Chambers, payment of the rent as from the 25th of March, 1887, quarterly, the first quarter being reduced to £3000, and interest at £5 per cent. on each quarterly instalment until payment. The Plaintiffs will have the costs of the action.

H. L. F.

C. A.

From this judgment the Defendant appealed. The appeal came on for hearing on the 15th of March, 1889.

Brice, Q.C., and *Ribton*, for the Appellant:—

We contend that there never was a contract, nothing but an offer, which was withdrawn before there had been any valid acceptance of it. The correspondence shews that there was nothing but negotiation, and that no final agreement had been entered into. There is a reference to the preparation of further

(1) Law Rep. 8 Ch. 173. (2) 6 Ch. D. 469.

documents, which is sufficient to prevent there being any contract made out from the letters.

[COTTON, L.J.:—If an offer is made and accepted, subject to the preparation of a formal agreement, there is no contract till the formal agreement is signed, but the cases shew that a mere expression of an intention to have further documents does not prevent there being a contract.]

It is not necessary that the word "subject" should be used: *Crossley* v. *Maycock* (1). *Hussey* v. *Horne-Payne* (2) is very like the present case; taking the whole correspondence together there was no contract, nothing but negotiations.

[LINDLEY, L.J.:—The real point here appears to me to be whether the principal effectually ratified a contract made by his agent without authority.]

An offer may be withdrawn without formal notice at any time before acceptance: *Dickinson* v. *Dodds* (3); and after withdrawal any ratification comes too late. Thus, in *Lyell* v. *Kennedy* (4) it was held that ratification after the *Statute of Limitations* had run came too late.

[LOPES, L.J., referred to *Walter* v. *James* (5).]

That case is in our favour; after the contract was rescinded ratification was too late. Stoppage *in transitu* by a person having no authority cannot be ratified after the goods have got into the hands of third parties: *Bird* v. *Brown* (6). In *Brewer* v. *Broadwood* (7) the principle was acted on that ratification must be before the contract is broken off, and so in *Lee* v. *Soames* (8).

[COTTON, L.J.:—That case comes to this: something is necessary to make a good title. The purchaser says get it within a certain time, if not, I withdraw. That is not like a case of a sale by an agent without authority.]

If the party repudiates, then the negotiation is at an end and no subsequent confirmation by the principal can revive it.

Then such misrepresentations were made as to the value of

(1) Law Rep. 18 Eq. 180.
(2) 4 App. Cas. 311.
(3) 2 Ch. D. 463.
(4) 18 Q. B. D. 796, 814.
(5) Law Rep. 6 Ex. 124.
(6) 4 Ex. 786.
(7) 22 Ch. D. 105.
(8) 36 W. R. 884.

C. A.
1889
BOLTON PARTNERS v. LAMBERT.

the machinery in the works as would entitle us to rescind. Mr. Justice *Kekewich* would not listen to this, because no reference was made to it by the Appellant when he repudiated the contract, but that is opposed to the decision of this Court in *Boston Deep Sea Fishing and Ice Company* v. *Ansell* (1).

Warmington, Q.C., and *Chadwyck Healey*, for the Plaintiffs, were not called on to argue the question whether there was a complete contract between *Scratchley* and the Defendant, or whether there had been misrepresentation:—

With respect to the question of ratification, the maxim *omnis ratihabitio retrotrahitur et mandato equiparatur* is applicable to this case. It is only a matter of evidence whether or not the agent had authority to make the contract. If the authority is proved it makes no difference at what time it is proved: *Brook* v. *Hook* (2). The Defendant argues that if a man makes a contract with an agent, there is a *locus pœnitentiæ* until the contract is confirmed by the principal; but there is no trace of any such doctrine in the law. He is bound, though the principal may not be. It may seem unfair upon him, but it is the law. The cases on marine insurance are strong instances of the rule being acted on in hard cases: *Hagedorn* v. *Oliverson* (3); *Ancona* v. *Marks* (4); *Maclean* v. *Dunn* (5). The only exceptions to the rule are: (1) where a vested estate is divested; (2) where there has been forgery; (3) where the ratification is after the time when the act could be done. In the present case the contract being a good binding contract there was no power of withdrawing from it, which would have been in fact a rescission.

Brice, in reply.

COTTON, L.J.:—

This is an appeal by the Defendant against a judgment of Mr. Justice *Kekewich* decreeing specific performance of a contract to take a lease. The contract was entered into by certain letters,

(1) 39 Ch. D. 339.
(2) Law Rep. 6 Ex. 89.
(3) 2 M. & S. 485.
(4) 7 H & N. 686.
(5) 4 Bing. 722.

but it is unnecessary to refer to the whole correspondence, as the transaction really begins and ends with the two letters of December the 8th and December the 13th, 1886, respectively. Taking those two letters alone, in my opinion they constitute a contract. The letter of the 8th of December, written by the Defendant to *Scratchley*, a director of the Plaintiff company, contained an offer by the Defendant to take a lease from the Plaintiff company on the terms therein mentioned, and the letter of the 13th of December, written by *Scratchley* to the Defendant, is in terms an acceptance of that offer. An objection was indeed made that it was only a qualified acceptance of the offer. It was urged that the acceptance was subject to the preparation by the company's solicitor "of the necessary documents." In my opinion the principle which governs this point is correctly stated by the late Master of the Rolls in *Crossley* v. *Maycock* (1): "if there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the Court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified or to be specified by the party making it, or by his solicitor, then, until those conditions are accepted, there is no final agreement such as the Court will enforce." It is said that the reference to the preparation of the necessary documents shewed that the acceptance was not intended to be a simple acceptance, because if there was a full and complete acceptance no documents would have been necessary. But persons often very unnecessarily desire that what has been agreed on should be drawn up in a formal way by solicitors, and in my opinion that was all that was intended by this reference. It was also urged that there was more than that in this case, and that on the letters themselves it could not be said that there was a completed contract, but that matters with reference to the machinery remained to be settled before the final agreement. [The Lord Justice read the passage in the Defendant's letter of the 8th of December with reference to the machinery, and continued:—] In my opinion that was merely the reasoning put forward by the

(1) Law Rep. 18 Eq. 181.

C. A.
1889
BOLTON PARTNERS v. LAMBERT.
Cotton, L.J.

Defendant to shew why he did not offer a larger rent, and does not prevent his offer from being a simple unqualified one.

Then it was said that other terms were introduced by subsequent letters, and the case of *Hussey* v. *Horne-Payne* (1) was relied on as shewing that in such circumstances there was no concluded contract. But the judgment of Lord *Cairns* in that case shews that it was not because the subsequent letters raised a doubt, that it was held that the two original letters did not form a completed agreement, but because the two original letters of themselves contained terms which raised the doubt.

That case therefore is not applicable, and in my opinion there was a binding contract constituted by these two letters alone.

But then it is said that on the 13th of January, 1887, the Defendant entirely withdrew the offer he had made. Of course the withdrawal could not be effective, if it were made after the contract had become complete. As soon as an offer has been accepted the contract is complete. But it is said that there could be a withdrawal by the Defendant on the 13th of January on this ground, that the offer of the Defendant had been accepted by *Scratchley*, a director of the Plaintiff company, who was not authorized to bind the company by acceptance of the offer, and therefore that until the company ratified *Scratchley's* act there was no acceptance on behalf of the company binding on the company, and therefore the Defendant could withdraw his offer. Is that so? The rule as to ratification by a principal of acts done by an assumed agent is that the ratification is thrown back to the date of the act done, and that the agent is put in the same position as if he had had authority to do the act at the time the act was done by him. Various cases have been referred to as laying down this principle, but there is no case exactly like the present one. The case of *Hagedorn* v. *Oliverson* (2) is a strong case of the application of the principle. It was there pointed out how favourable the rule was to the principal, because till ratification he was not bound, and he had an option to adopt or not to adopt what had been done. In that case the plaintiff had effected an insurance on a ship in which another person was interested, and it was held that long after the ship had been lost the other

(1) 4 App. Cas. 311. (2) 2 M. & S. 485.

person might adopt the act of the plaintiff, though done without authority, so as to enable the plaintiff to sue upon the policy. Again, in *Ancona* v. *Marks* (1), where a bill was indorsed to and sued on in the name of *Ancona*, who had given no authority for that purpose, yet it was held that *Ancona* could, after the action had been brought, ratify what had been done, and that the subsequent ratification was equivalent to a prior authority so as to entitle *Ancona* to sue upon the bill. It was said by Mr. *Brice* that in that case there was a previously existing liability of the defendant towards some person; but the liability of the defendant to *Ancona* was established by *Ancona's* authorizing and ratifying the act of the agent, and a previously existing liability to others did not affect the principle laid down.

The rule as to ratification is of course subject to some exceptions. An estate once vested cannot be divested, nor can an act lawful at the time of its performance be rendered unlawful, by the application of the doctrine of ratification. The case of *Walter* v. *James* (2) was relied on by the Appellant, but in that case there was an agreement between the assumed agent of the defendant and the plaintiff to cancel what had been done before any ratification by the defendant; in the present case there was no agreement made between *Scratchley* and the Defendant that what had been done by *Scratchley* should be considered as null and void.

The case of *Bird* v. *Brown* (3), which was also relied on by the Appellant, is distinguishable from this case. There it was held that the ratification could not operate to divest the ownership which had previously vested in the purchaser by the delivery of the goods before the ratification of the alleged *stoppage in transitu*. So also in *Lyell* v. *Kennedy* (4) the plaintiff, who represented the lawful heir, desired, after the defendant *Kennedy* had acquired a title to the estate by means of the *Statute of Limitations*, and after the title of the heir was gone, to ratify the act of *Kennedy* as to the receipt of rents, so as to make the estate vest in the heir. In my opinion none of these cases support the Appellant's contention.

I think the proper view is that the acceptance by *Scratchley*

(1) 7 H. & N. 686.
(2) Law Rep. 6 Ex. 124.
(3) 4 Ex. 786.
(4) 18 Q. B. D. 796.

C. A.
1889
BOLTON PARTNERS v. LAMBERT.
Cotton, L.J.

did constitute a contract, subject to its being shewn that *Scratchley* had authority to bind the company. If that were not shewn there would be no contract on the part of the company, but when and as soon as authority was given to *Scratchley* to bind the company the authority was thrown back to the time when the act was done by *Scratchley*, and prevented the Defendant withdrawing his offer, because it was then no longer an offer, but a binding contract.

This point therefore must also be decided against the Appellant. Another point was raised as to misrepresentation, but, having regard to the evidence, in my opinion that has not been made out. The appeal therefore fails.

LINDLEY, L.J.:—

I am of the same opinion. Three defences are set up. The first is that the two letters of the 8th of December and the 13th of December did not amount to a contract at all, but were mere negotiations: the second is, that the contract, if any, was based on a misrepresentation such as to entitle the Defendant to resist specific performance; and the third is, that no contract was made, because the offer was withdrawn before acceptance. In my opinion there is nothing in the first or second points. As to the first point, it is impossible to read the two letters otherwise than as amounting to a clear offer and an acceptance; and as to the second point there is no proof of misrepresentation. The third point is altogether a different one, and is much more difficult. [His Lordship referred briefly to the facts of the case, and continued:—]

The question is what is the consequence of the withdrawal of the offer after acceptance by the assumed agent but before the authority of the agent has been ratified? Is the withdrawal in time? It is said on the one hand that the ordinary principle of law applies, viz., that an offer may be withdrawn before acceptance. That proposition is of course true. But the question is—acceptance by whom? It is not a question whether a mere offer can be withdrawn, but the question is whether, when there has been in fact an acceptance which is in form an acceptance by a principal through his agent, though the person assuming to act as

agent has not then been so authorized, there can or cannot be a withdrawal of the offer before the ratification of the acceptance? I can find no authority in the books to warrant the contention that an offer made, and in fact accepted by a principal through an agent or otherwise, can be withdrawn. The true view on the contrary appears to be that the doctrine as to the retrospective action of ratification is applicable.

If we look at Mr. *Brice's* argument closely it will be found to turn on this—that the acceptance was a nullity, and unless we are prepared to say that the acceptance of the agent was absolutely a nullity, Mr. *Brice's* contention cannot be accepted. That the acceptance by the assumed agent cannot be treated as going for nothing is apparent from the case of *Walter* v. *James* (1). I see no reason to take this case out of the application of the general principle as to ratification. The appeal therefore fails on all points.

LOPES, L.J.:—

An important point is raised with regard to the withdrawal of the offer before ratification in this case.

If there had been no withdrawal of the offer this case would have been simple. The ratification by the Plaintiffs would have related back to the time of the acceptance of the Defendant's offer by *Scratchley*, and the Plaintiffs would have adopted a contract made on their behalf.

It is said that there was no contract which could be ratified, because *Scratchley* at the time he accepted the Defendant's offer had no authority to act for the Plaintiffs. Directly *Scratchley* on behalf and in the name of the Plaintiffs accepted the Defendant's offer I think there was a contract made by *Scratchley* assuming to act for the Plaintiffs, subject to proof by the Plaintiffs that *Scratchley* had that authority.

The Plaintiffs subsequently did adopt the contract, and thereby recognised the authority of their agent *Scratchley*. Directly they did so the doctrine of ratification applied and gave the same effect to the contract made by *Scratchley* as it would have had if

(1) Law Rep. 6 Ex. 124.

C. A.
1889
BOLTON PARTNERS v. LAMBERT
Lopes, L.J.

Scratchley had been clothed with a precedent authority to make it.

If *Scratchley* had acted under a precedent authority the withdrawal of the offer by the Defendant would have been inoperative, and it is equally inoperative where the Plaintiffs have ratified and adopted the contract of the agent. To hold otherwise would be to deprive the doctrine of ratification of its retrospective effect. To use the words of Baron *Martin* in *Brook* v. *Hook* (1), the ratification would not be "dragged back as it were, and made equipollent to a prior command."

I have nothing to add with regard to the other points raised. I agree with what has been said on those points. The appeal must be dismissed.

Solicitors: *Spencer Whitehead*, agent for *Milward & Co., Birmingham; Bennett & Leaver.*

M. W.

C. A.
1889
KAY, J
Jan. 11
C. A.
March 21.

In re BOURGOISE.

[1887 B. 5227.]

Infant—Guardian—Nationality—Jurisdiction—Alien—French Subject—Naturalization—British Subject—Certificate of Naturalization—Qualification—Naturalization Act, 1870 (33 & 34 *Vict. c.* 14), *s.* 7 [*Revised Ed. Statutes, vol. xvi., p.* 271].

The usual qualified certificate of naturalization under the *Naturalization Act*, 1870, effects only a partial, not a complete, naturalization; so that a Frenchman, in taking out such a certificate, does not thereby lose his *status* as a French subject, since by the French law he cannot be completely naturalized in a foreign country except by the authority of the French Government.

In 1866 a Frenchman came to reside in *England*, and in 1871 obtained the usual qualified certificate of naturalization as a British subject under the *Naturalization Act*, 1870, sect. 7, but he did not obtain from the French Government the necessary authority required by the law of *France* to his becoming a naturalized British subject. In 1880 he married an English lady and then returned with her to *France*, where he resided till his death. By his will, in French form, he gave his residuary estate, which included considerable personal estate in *England*, to his widow for life, with

(1) Law Rep. 6 Ex. 96.

remainder to his two infant children, both of whom were born in *France*. On the death of the widow, who had continued to reside in *France*, a guardian of the infants was appointed by the French Courts:—

Held, by *Kay*, J., that the father was, at the time of his death, a French subject, and that his children were also French subjects, and, therefore, that the Court had no jurisdiction to appoint an English guardian of the infants.

Held, by the Court of Appeal, that, independently of the questions whether the naturalization of the infants' father was complete or not, and what was the effect of the naturalization, if complete, on the *status* of the children, on which the Court expressed no opinion, the Court ought not to interfere with the decision of the French Courts by appointing an English guardian.

JULES EDOUARD BOURGOISE was born in 1833 in *France* of French parents, and was brought up and educated in *France*. For many years he worked in his father's house of business at *Havre*. In or about the year 1861 he came over to *England* and remained two or three years at *Liverpool* as business agent for his father. He then returned to *Havre* and continued to assist his father there until his father's death in 1866, when he returned to *England* and became partner in a mercantile firm at *Liverpool*.

In 1871 he applied, under the *Naturalization Act*, 1870, for a certificate of naturalization as a British subject, which was accordingly granted in the following form, being the form usually adopted in such cases:—

"*Naturalization Acts*, 1870.

"*Certificate of Naturalization to an Alien*

"*Home Office, London.*

"Whereas *Jules Edouard Bourgoise*, an alien, now residing at 12, *Brunswick Street*, in the borough of *Liverpool*, in the county of *Lancaster*, has presented to me, the Right Honourable *Henry Austin Bruce*, one of Her Majesty's principal Secretaries of State, a memorial praying for a certificate of naturalization, and alleging that he is a native of *France*, aged thirty-eight, is a corn merchant, and unmarried, and that in the period of eight years preceding his application he has resided for five years within the *United Kingdom*, and intends, when naturalized, to reside therein. And whereas I have inquired into the circumstances of the case and have received such evidence as I have deemed necessary for proving the truth of the allegations contained in such memorial, so far as the same relate to the memorialist: Now, in pursuance

C. A.
1889
In re
BOURGOISE.

of the authority given to me by the said Acts, I grant to the aforesaid *J. E. Bourgoise* this certificate, and declare that he is hereby naturalized as a British subject, and that upon taking the oath of allegiance he shall in the *United Kingdom* be entitled to all political and other rights, powers, and privileges, and be subject to all obligations to which a natural-born British subject is entitled or subject in the *United Kingdom*, with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to his obtaining this certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect.

"In witness whereof I have hereunto subscribed my name this 16th day of January, 1871.

"(Signed) *H. A. Bruce.*"

To the certificate was appended a form of the oath of allegiance, which was duly taken and signed by *Bourgoise.*

In 1880 *Bourgoise* married an English lady, and thereupon retired from business, having amassed a considerable fortune. He then returned with his wife to *France*, where he purchased considerable landed property, and also carried on the business of a commission agent at *Paris.* He continued to reside in *France* until his death, which occurred on the 18th of August, 1886, at his residence in *Neuilly-sur-Seine.* He left property to a large amount, about half of it consisting of personal estate in *England* of considerable value. There were issue of his marriage two children, both born in *France*, their births being registered at the British Consulate at *Paris.* The children had always resided in *France.*

Shortly before his death *Bourgoise* made a will, in French form, giving his residuary estate to his wife for life, with remainder to his children, and thereby associated two gentlemen with his wife as a council for the guardianship of his children.

On the 27th of May, 1887, administration of the testator's effects in *England* was granted to the widow.

On the 5th of June, 1887, the widow died in *Paris*, her two children by the testator having resided with her there until her death. Shortly before her death she made a declaration in

writing expressing her desire that the two children should be placed under the care of *William Henry Johns*, an Englishman, a son of hers by a former marriage.

Upon her death family disputes arose as to whether the guardianship of the two infant children should be entrusted to the testator's mother, a French lady resident in *France*, or to *W. H. Johns*, and ultimately, under proceedings taken in the French Courts, the testator's mother was appointed the infants' *tutrice*, or guardian. This originating summons was then taken out by the infants by *Johns*, as their next friend, asking that he might be appointed guardian of the persons and estates of the infants during their respective minorities, or until further order.

The summons was opposed by the infants' French guardian and their paternal aunt, also a French lady resident in *France*, on the ground that the certificate of naturalization was informal, and that the testator's nationality and domicil at the time of his death were French.

No grant of letters of administration in *England* to the testator's estate had been made since the widow's death, though it appeared that an application was pending for a grant to the infants' paternal grandmother, as their guardian according to the French law.

On behalf of the French relatives an affidavit was filed by Mr. *Charles Kennerley Hall*, who had practised as an advocate in *Paris* for more than twenty years, in which he stated as follows:—

"A Frenchman can by French law divest himself of his nationality as a Frenchman by becoming naturalized in a foreign country. But to do this he must be completely naturalized: that is to say, he must by such naturalization acquire all the rights of a natural-born subject of the country in which he obtains naturalization. Any qualification, such as that which is inserted in English certificates, renders naturalization only partial and incomplete, and does not deprive a Frenchman of his French nationality. Such a qualified naturalization is looked upon as conferring little more than the rights which a foreigner can acquire in *France* under art. 13 of the *Civil Code*, or *Code Napoléon*, which provides as follows: 'The foreigner who shall have been admitted by the

C. A.
1889
In re
BOURGOISE

authority of (the Emperor, King, or President) to establish his domicil in *France*, shall enjoy there all the civil rights so long as he shall continue to reside there;' and such grant of domicil in *France* does not affect nationality. By an Imperial decree, having force of law, dated the 26th of August, 1811, it is provided as follows: 'Art. 1. No Frenchman can be naturalized in a foreign country without an authority.' Such decree has never been abrogated, and is still in force. I am informed and believe that the said *J. E. Bourgoise* never applied for or obtained such authority or permission."

In reply to that affidavit M. Clunet, another French advocate, deposed:—

"3. It is a fundamental principle of the French law relating to nationality that a Frenchman can at will divest himself of his nationality of origin and adopt that of another country without the necessity of obtaining the permission of the French Government.

"4. The law on the subject is governed by art. 17 of the French *Code Civil*, which says, '*La qualité de Français se perdra*, 1° *par la naturalisation acquise en pays étranger;* 2° *par l'acceptation non autorisée par le* (*Président de la République*) *de fonctions publiques conférées par un gouvernement étranger;* 3° *enfin par tout établissement fait en pays étranger, sans esprit de retour.*'

"5. The decree of *Napoleon*, dated the 26th of August, 1811, made at a time when the State was simply a military organization, and with a purely military object, has not affected the case, and does not conflict with art. 17 of the *Code Civil* or its effects. It could be easily shewn that the decree of *Napoleon* was not legal, and that the Emperor in making it had exceeded his powers; but the matter is much more simple. All the legal authorities agree that the only effect of this decree is to impose certain penalties on the Frenchman who becomes naturalized in a foreign country without the permission of his Government. It does not alter the effect of such naturalization or the consequent loss of his '*qualité de Français*' under art. 17 of the *Code Civil*. The penalties in question were the confiscation of goods and the

loss of testamentary rights and those of inheritance; but they no longer attach, as they have been repealed by subsequent legislation and political constitutions. The decree has no effect on the *status* of the individual. It does not prevent a Frenchman from losing his French nationality on obtaining naturalization in a foreign country, or residing there permanently. It merely says that if he does either of these things he will subject himself to certain penalties, which, however, no longer exist; and this view of the authorities is the one which best accords with the fundamental principle alluded to in the 3rd paragraph of this affidavit." The deponent then proceeded to cite the authorities.

The summons was heard before Mr. Justice *Kay* on the 11th of January, 1888.

Renshaw, Q.C., *Stock*, and *Benn*, for the Applicants:—

We submit the Court has jurisdiction to appoint a guardian of these infants. The certificate of naturalization gave the father the same *status* as a British-born subject. It is true his children were both born in *France*, but their births were registered at the British Consulate at *Paris*. The effect of an alien taking out a certificate of naturalization in this country is to make him cease to be a subject of the foreign state.

[KAY, J.:—But the certificate contains an important qualification. The meaning of a certificate in this form, which is made in pursuance of sect. 7 of the *Naturalization Act*, 1870 (1), is that the alien shall be considered a British subject, but that, unless by some law of the foreign state to which he belongs, he is deprived of his rights of citizenship when he goes back to reside there,

(1) The *Naturalization Act*, 1870 (33 & 34 Vict. c. 14), sect. 7, provides that an alien who has resided in the *United Kingdom* for a term of not less than five years, may apply for a certificate of naturalization; and that "an alien to whom a certificate of naturalization is granted shall in the *United Kingdom* be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in the *United Kingdom*, with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect."

C. A.
1889
In re
BOURGOISE.

he shall not be considered a British subject. It was surely not the intention of this qualified grant of naturalization to deprive this gentleman of his French nationality when he went back to reside in *France.* This is not an absolute grant of naturalization, but only a conditional grant: it effects a naturalization so long only as he resides in this country.]

We submit it extends further than that: there would be no reason for the certificate if its effect was merely to naturalize the alien while in this country.

[KAY, J.:—Does a qualified naturalization in this country make a Frenchman cease, *de facto,* to be a French subject?]

We submit that it does, according to the existing French law, for it appears from the evidence that the decree of *Napoleon* I. of the 26th of August, 1811, has now been repealed. The effect of the certificate and of the *Naturalization Act,* 1870, was, in fact, to denude this testator of his *status* as a French citizen. If, then, this testator was a naturalized British subject, his children, though born abroad, are also British subjects, and they having property here, this Court has jurisdiction to appoint a guardian: *In re Willoughby* (1).

Marten, Q.C., and *Farwell,* for the Respondents, were not called upon.

KAY, J.:—

I am clearly of opinion that I cannot interfere. The facts are shortly these. A Frenchman came to this country: he married in this country, and lived a great many years in this country; and while here he obtained a certificate of naturalization. It was not an absolute certificate of naturalization constituting him a British subject to all intents and purposes, but it was a certificate subject to a qualification taken from the *Naturalization Act,* 1870 (33 & 34 Vict. c. 14), sect. 7 of which provides that an alien who has resided in the *United Kingdom* for a term of not less than five years may apply for a certificate of naturalization, and that the certificate, when granted, shall

(1) 30 Ch. D. 324.

give him all the rights of a British subject, "with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect." Those very words are repeated in the certificate of naturalization. Therefore it is not a certificate of naturalization absolutely to all intents and purposes, but practically it amounts to a certificate of naturalization so long, and so long only, as the subject of it does not reside in his original country, *France*, unless by the law of *France* the certificate makes him cease to be a French subject to all intents and purposes. Now, does the law of *France* provide that when a man has received a qualified certificate of naturalization, he being originally a French subject, that qualified certificate makes him cease to be a French subject to all intents and purposes, whether he afterwards resides in *France* or not? The evidence on this point is as follows:—[His Lordship then read the paragraphs above stated from the affidavit of Mr. *C. K. Hall*, and continued:—] It is not denied that the testator, *J. E. Bourgoise*, never did obtain any authority or permission in *France*, as required by the Imperial decree of the 26th of August, 1811, to become naturalized in a foreign country. The only affidavit against that of Mr. *Hall* is one by M. *Clunet*, another French advocate, but he does not address his mind to this point. He does not say that the certificate is enough, according to the law of *France*, to deprive a Frenchman who has obtained it of all his rights as a French subject; and he cites authorities which do not touch that point at all. Supposing a Frenchman took out a certificate in this country giving him naturalization for a year—would that deprive him of his French nationality for ever? The whole question depends, in my opinion, on art. 17 of the French *Code Civil*, which is this:—[His Lordship read it, and continued:—] That means, "The quality of a French subject shall be lost, first, by naturalization acquired in a foreign country," but that must mean, by an absolute naturalization, not a qualified one: and the point is, "Will a qualified naturalization deprive a Frenchman of his

C. A.
1889
In re BOURGOISE.
Kay, J.

status?" On the one hand it is said that, under the Imperial decree of the 26th of August, 1811, no Frenchman can be naturalized in a foreign country without an authority: on the other hand it is said that the only effect of that decree was to impose penalties on a Frenchman who became naturalized without permission, and that those penalties have now been abrogated. But there is no evidence that the decree itself has been abrogated (1). Therefore there is authority for saying that a Frenchman cannot be deprived, without permission, of his *status* as a French subject. Here no such permission or authority was obtained. M. *Clunet* does not address himself to the point raised by Mr. *Hall*, that a Frenchman cannot be completely naturalized in a foreign country without a proper authority. That seems to be the law of *France*.

In the present case what has happened was, that M. *Bourgoise* returned to *France* and resided there some years before his death, and that he died there. He had married an English lady, who acquired the *status* of her husband, whatever that was. By her he had children, who were living in *France* at the time of the death of their father. According to the qualification in the certificate he was, at the moment of his death, a subject of *France*, and therefore his children were subjects of *France*. I must therefore hold that he was, at the time of his death, a subject of *France*, and that his children were also subjects of *France*; and, accordingly, that this Court has no jurisdiction to interfere by the appointment of guardians.

I dismiss the summons, with costs, to be paid by the next friend of the Applicants.

G. I. F. C.

C. A.

From this decision the Applicants appealed.

The appeal was heard on the 21st of March, 1889.

Benn, for the Appellants.

Marten, Q.C., and *Farwell*, for the Respondents, were not called on.

(1) See "*Les Codes Annotés de Sirey*," *par P. Gilbert*, Ed. 1855, vol. i. p. 67.

COTTON, L.J.:—

This is an appeal by infants by their next friend against the refusal by Mr. Justice *Kay* to appoint guardians of the infants.

The infants are resident in *France*—not in this country, and the Court has not the duty laid upon it of taking care of the children, and of appointing guardians if necessary. The infants, being resident in *France*, the French Courts have assumed jurisdiction, and have exercised the jurisdiction by appointing guardians of them. Ought this Court, under the circumstances, to appoint guardians for the purpose of interfering with the guardians who have been appointed by the French tribunal? The father was a Frenchman, but in *England* he obtained a certificate of naturalization: then he married an Englishwoman in *England*, and afterwards went to *France*, where he lived up to the time of his death; and his wife, who had gone with him, lived there until she died, and there the children were born and have ever since resided.

It is said that these children must be considered as English subjects. They were the children of an English woman who married a Frenchman who obtained naturalization here; but they were born abroad, and *primâ facie*, according to the laws of *England*, and I suppose according to the law of all civilised countries, that makes them subjects of the French state. If they had been born in *England* they would, without any Act of Parliament, have been subjects of the English Crown; but in the circumstances of this case are they to be considered as British subjects? What is relied upon is the *Act of Naturalization* of 1870, sect. 7, which is this: "An alien to whom a certificate of naturalization is granted shall in the *United Kingdom* be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in the *United Kingdom*, with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect."

C. A.
1889
In re BOURGOISE.
Cotton, L.J.

Now, there is a question raised here, what is the effect in *France* of this certificate of naturalization given under this Act of Parliament? There are affidavits on both sides on which Mr. Justice *Kay* determined that the father had not been naturalized so completely as to make him when he was in *France* an English subject, and to make his children therefore persons with whom the English Courts ought in any way to interfere.

But there is a further question, whether, if there was complete naturalization so that he would be entitled in *France* still to take the benefit given to him by this certificate of naturalization, the children would be in the position of English subjects. That, in my opinion, is the privilege of the children, and not of the father. That is shewn by the case of *Fitch* v. *Weber* (1) before Sir *James Wigram*.

There appear to be these two questions which would have to be decided, if we are to say that the Court ought to interfere on the ground of their being British subjects. In my opinion they are questions which would require great consideration, and I will not give any opinion either one way or the other, though I have an opinion upon the subject. But, under the circumstances, seeing that the children are children born in *France*, and over whom the French Court has exercised jurisdiction by appointing guardians, it would not be right in my opinion to interfere here in order to appoint guardians—it being very doubtful, to say the least, whether these are infants entitled to be considered British subjects, or whether they ought to be considered French subjects. It might be, if it were of very great importance, that we should direct or authorize the parties to take the opinion of the French Court (which certainly they have not done, except so far as it arose on the appointment of guardians) as to what the law of *France* is; but in such a case as this, where there is no pressing necessity for having these questions decided, I think the best course to adopt is to say we do not decide these questions, or put them in train for decision.

Under the circumstances we think it is not desirable that we should attempt to appoint guardians of these infants, and we dismiss the appeal.

(1) 6 Hare, 51.

LINDLEY, L.J.:—

I am of the same opinion. The infants were born in *France;* their father was a Frenchman; their mother was an Englishwoman. Their father had obtained a certificate of naturalization here, and after he obtained that, he went to *France* and lived there until he died.

The question whether these children are English or French appears to me to be one of very great difficulty, and I do not pretend to decide it. In order to decide it, I should like to look into the matter much more carefully than I have done. But there is no necessity, as far as I can see, for appointing new guardians here. They have been treated in *France* as French people, and guardians have been appointed for them there. Mr. Justice *Kay* declined to appoint guardians on the ground that these children were French. I am not at all satisfied that they are not. However, we will not decide that, but will leave the matter as it is, and dismiss the appeal.

BOWEN, L.J.:—

I am of the same opinion. These children were born in *France,* and have never been out of *France.* They were born of a gentlemen who was a Frenchman at one time. They are at present in the hands of French guardians, who have been appointed with all formalities recognised by French law. Now we are asked to interfere and appoint guardians. On what ground? On the ground that the nationality of these children is not French but English. That is rather an ambiguous way of stating the question. That way of stating the question assumes that there never could be a conflict between the law of the two countries on a point which is by no means certain. But, however that may be, are these children, in virtue of the *Naturalization Act,* children whom the English law regards as English subjects? That depends first upon whether the naturalization of their father under the *Naturalization Act* prevented him from re-becoming a French subject under the circumstances which have occurred. The second point is whether such statutory naturalization of the father would impose according to English law an English nationality upon the children. As to the first point it appears to me that the

C. A.
1889
In re
BOURGOISI
Bowen, L.J.

question raised on the affidavits is a doubtful one, and although Mr. Justice *Kay* has expressed his judgment on the point, I do not propose to discuss it. Whether, if the father remained in the view of English law, an English subject, one of the consequences which would follow under the *Naturalization Act* would be, that these children would in virtue of the *Naturalization Act* become English subjects according to English law, is a still more doubtful point, having regard to what we have said during the argument, and, like the Lords Justices who have preceded me, I do not propose on this occasion to decide so important and so serious a matter.

But there is another branch of the subject which really has to be considered, and which stands quite apart from and by the side of the question of the effect of the *Naturalization Act* of 1870 on the matters which have been submitted to us: it is what is the view of the law taken in *France?* What, according to French law is the *status* of these children? Because we ought only to act according to the true interests of the children. We have been offered affidavits on the point as to what the position of the French father was, but there is an entire absence on the affidavits before us of any suggestion that according to the French law (whatever the *status* of the father was before his death, whether he had acquired French *status*, or *sub modo*, or not at all) the children are not at the present moment according to the French law, French subjects. For anything we know, the view of the French authorities and Courts may be that these children are French subjects. They are at any rate in the hands of the French guardians who have been appointed according to formalities recognised by French law, and that being so, it seems to me there is no case made out to justify us in the interests of the children in interfering with the guardianship which, for anything we know, according to the law of the country in which they are may be a proper one; and may be for the very best interests of the children themselves.

Solicitors: *Dixon, Ward & Co.: Murray, Hutchins & Stirling.*

M. W.

LUMLEY *v.* BROOKS.

C. A.
1889
April 3.

[1888 L. 1702.]

Practice—Solicitor—Action on untaxed Bill of Costs.

Solicitors brought an action against their client for the amount of their bill of costs delivered shortly before the commencement of the action. The Defendant denied the retainer, alleged negligence, and counter-claimed for damages on the ground of negligence. At the trial the Defendant did not appear and the Plaintiffs proved their case. *Kay*, J., declined to make any other order than an order referring the bill for taxation under the statute 6 & 7 Vict. c. 73, reserving the costs of the action and adjourning the further hearing:—

Held, on appeal, that the Plaintiffs were entitled to have the counter-claim dismissed with costs, and to have judgment for the amount to be certified on the taxation, with costs of the action up to and including the hearing.

THE Plaintiffs, who were solicitors, brought their action against *Brooks* for a bill of costs signed and delivered on the 4th of June, 1888, shortly before the commencement of the action, comprising fees £196 4*s.* 8*d.*, less cash paid £28 17*s.* 4*d.*, balance £167 7*s.* 4*d.*, and £110 0*s.* 8*d.* money expended by them as solicitors. They also alleged an equitable mortgage by deposit made to them by *Brooks* in April, 1885, of certain property, and claimed payment, or in default foreclosure and possession.

Brooks by his defence alleged that he did not retain the Plaintiffs, and that they had not rendered any services to him, nor expended any money for him, or at his request, and he denied the existence of any equitable mortgage. By counter-claim he claimed an account of moneys alleged by him to have been received by the Plaintiffs on his behalf and not accounted for, and damages for loss alleged to have been sustained by him through certain steps improperly taken by the Plaintiffs as his solicitors in a suit brought against him by his wife for dissolution of marriage.

The action was tried by Mr. Justice *Kay* on the 28th of February, and 4th of March, 1889. No one appeared for the Defendant. Evidence was gone into and the retainer was proved, but

C. A.
1889
LUMLEY
v.
BROOKS.

the equitable mortgage was not. Mr. Justice *Kay* held that the bill must be taxed, and to this the Plaintiffs did not object, but asked to have judgment for the amount to be found due. His Lordship declined to accede to this, and made the following order:

Order that it be referred to the Taxing Master to tax and settle the bill of fees and disbursements delivered by the Plaintiffs to the Defendant *R. Brooks*. Order that the Plaintiffs and the Defendant *Brooks* do produce before the said Master upon oath, as he shall direct, all books, papers, and writings in their custody or power respectively relating to the matters hereby referred, or any of them, and that they be examined touching the same matters, or any of them, as the said Master shall direct. Order that the Plaintiffs do give credit for any sums of money by them received from or on account of the Defendant *Brooks*, and be at liberty to charge all sums of money paid by them to or on account of the said Defendant. Order that if the said bill when taxed be less by a sixth part than the said bill as delivered the said Master do tax the costs of the said Defendant of this reference, and if the said bill when taxed shall not be less by a sixth part than the said bill as delivered, the said Master do tax the costs of the Plaintiffs of such reference. Order that the said Master do certify the amount due from the said Defendant to the Plaintiffs, or from them to the said Defendant, as the case may be, having regard to the costs of such reference so to be taxed as aforesaid, and any sum or sums of money which may have been so received or paid as aforesaid. And the costs of this action are reserved, and the further hearing of this action is adjourned, with liberty to apply.

The Plaintiffs appealed.

John G. Witt, and *E. de Witt*, for the appeal:—

We do not appeal from the decision that there was no equitable mortgage. The action therefore may be treated simply as an action for a bill of costs. The bill was taxable at the time when the action was commenced, and we do not complain that the order referred it for taxation, but we contend that we are entitled to judgment for what shall be found due on taxation. The action is in fact a common law action, and it is a matter of right that the Plaintiffs should have judgment. We must be entitled to at least as good an order at the trial as the order made on summons in *Smith* v. *Edwardes* (1). The counter-claim should be dismissed with costs, for the receipt of moneys and negligence have been alleged and not proved. If the present

(1) 22 Q. B. D. 10.

order is left standing the Plaintiffs will have no judgment that they can plead to an action by the Defendant for negligence. We ought to have judgment with costs up to and including the trial. The Defendant disputed the retainer and set up negligence, thus entirely denying our title. Mr. Justice *Kay* reserved the costs saying there was no *constat* that anything was due, but it cannot be regarded as possible that such was the case.

No one appeared for the Defendant.

COTTON, L.J.:—

This is an appeal by the Plaintiffs from an order of Mr. Justice *Kay*, whose reasons for making it in the form in which it stands we unfortunately do not know. The action is by solicitors against their client for the amount of their bill of costs, and the Defendant pleaded that he had never retained them, and that they had been guilty of negligence, and he counter-claimed for negligence and for moneys received on his account. The Defendant did not appear at the trial, and the Plaintiffs proved their case. Mr. Justice *Kay* refused to make any other order than an order referring the bill for taxation, reserving the costs of the action and adjourning the further hearing. I am of opinion that the Plaintiffs were entitled to have the counter-claim dismissed with costs, and to have judgment with costs for the sum which shall be found due on taxation. The Lord Justice *Fry* has settled the minutes of our order.

LINDLEY, L.J.:—

I agree that Mr. Justice *Kay* has not given to the Plaintiffs the relief to which they are entitled. I think they are entitled to a judgment for the amount to be found due on taxation, negativing negligence, and dismissing the counter-claim. There is some little difficulty in framing a satisfactory order, but the minutes which the Lord Justice *Fry* has settled, and which proceed on the same lines as the order in *Smith* v. *Edwardes* (1) appear to me to be satisfactory.

(1) 22 Q. B. D 10.

C. A.
1889
LUMLEY v. BROOKS.

FRY, L.J.:—

The minutes of the judgment which we propose to substitute for the order made by Mr. Justice *Kay* are as follows:—

Dismiss counter-claim with costs to be paid by Defendant. Order that the bill of costs on which this action is brought be referred to the Taxing Master pursuant to the statute 6 & 7 Vict. c. 73, and that the Plaintiffs give credit at the time of taxation for all sums of money received by them from or on account of the Defendant, and order that the Defendant pay to the Plaintiffs the amount of the certificate of the Master on the taxation (after adding or deducting as the case may be the costs of taxation), together with the costs of the action up to and including the hearing.

Solicitors: *Lumley & Lumley.*

H. C. J.

C. A.
1888
STIRLING, J.
Dec. 13, 20.
C. A.
1889
April 5.

In re PARK.
COLE *v.* PARK.

[1887 P. 1073.]

Solicitor—Costs—Taxation—Bill delivered more than Twelve Months—Executor—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37 [*Revised Ed. Statutes, vol. ix., p.* 128].

In an action by an executor to administer the estate of his testator, a firm of solicitors carried in a claim for the sum of £221 3*s.* 1*d.* as the balance due to them upon certain bills of costs delivered by them to the testator more than twelve months before his death, to which bills the testator had made no objection in his lifetime, and in respect of which he had paid £200 on account. The executor alleged that some of the charges were unreasonable. The Chief Clerk after looking at the bills determined to refer them to the Taxing Master, and the Claimants objecting to this, the case was adjourned into Court:—

Held, by *Stirling,* J., and by the Court of Appeal, that although, as no special circumstances were alleged, a taxation under the *Solicitors Act* could not be ordered, and the retaining the bill for twelve months without objection was *primâ facie* evidence of its being reasonable, the executor was not estopped from disputing any of the items, and that it ought to be referred to the Taxing Master to inquire and state whether any and which of the particular items to which the executor objected were fair and proper to be allowed, and to what amount respectively.

Anderson v. *May* (1) observed upon.

Form of order in *Allen* v. *Jarvis* (2) adopted.

THE testator, *J. C. Park,* died in January, 1887, at the age of eighty years and upwards; and shortly after his death this action

(1) 2 B. & P. 237. (2) Law Rep. 4 Ch. 616.

was brought by the executor of his will for the administration of his estate.

In May, 1887, judgment was delivered in the action directing (*inter alia*) an inquiry as to the debts owing by the testator at the time of his death; and the usual advertisement for creditors was issued.

Amongst other claims carried in against the estate was one from Messrs *Longcroft & Green*, of *Havant*, solicitors, for £221 3*s*. 1*d*., being the balance alleged to be due to them from the testator in respect of certain bills of costs delivered by them to him during his lifetime.

It appeared from an affidavit of Mr. *H. M. Green*, which was filed in support of this claim, that his firm had delivered to the testator on the 9th of January, 1883, a bill of costs and charges against him amounting to £212 14*s*. 5*d*, and on the 13th of November, 1885, three several bills of costs and charges amounting to £43 8*s*. 8*d*., £91 0*s*. 6*d*., and £263 19*s*. 6*d*. respectively; that the testator had never taken any exception, or made any objection to such bills, and that he had in May, 1886, paid to the firm "the sum of £200 on account and in part of a balance of £421 3*s*. 1*d*. then owing to my said firm in respect of all the before-mentioned bills of costs." A sum of £190 purchase-money had in 1884 been retained by the solicitors in part payment of the first bill.

When the claim came on for adjudication the Plaintiff disputed some of the charges, and the Chief Clerk determined to refer the bills to the Taxing Master. Messrs. *Longcroft & Green* objected to such reference, upon the ground that in the absence of special circumstances the Court had no power to direct bills delivered more than twelve months before the death of a testator, to which bills he had himself raised no objection, and in respect of which he had made a payment on account, to be either taxed, moderated, or inquired into. The matter was then brought before the Judge in Chambers, and was ultimately adjourned into Court, and was heard before Mr. Justice *Stirling* on the 13th of December, 1888.

Grosvenor Woods, for the Claimants:—

The cases in which bills have been moderated do not apply.

C. A.
1889
In re PARK.
COLE *v.* PARK.

Those are not cases between solicitor and client but cases where a trustee or agent brings in in an account against his *cestui que trust* or principal a bill of costs paid by him, and the Court refers the bill to the Taxing Master to ascertain how much of it should be allowed as a disbursement in such account.

In the absence of special circumstances, and none are here alleged, the Court has now no jurisdiction to direct taxation of a solicitor's bill of costs delivered more than twelve months before the death of the client. As to such bills the *Solicitors Act*, 1843, is conclusive; and if the client does not choose to avail himself of the right of taxation thereby conferred upon him, he must be taken to have accepted his liability. The Court has no power to deal with solicitors' bills of costs under its general jurisdiction over the officers of the Court.

[STIRLING, J.:—The practice is for the Chief Clerk to send the bill to the Taxing Master, not for taxation, but as a matter of convenience, the Taxing Master being the officer most conversant with such matters.]

The investigation on such a claim in Chambers is, in fact, merely a substitute for an action at common law; and accordingly the Claimants should be placed in a position corresponding, as nearly as the difference in the forms of procedure will allow, to that which they would occupy if they had brought an action at common law against the legal personal representative of the testator, for the amount of the bill. And if they had done this, the practice of the Courts of Common Law is and has been, in cases where from the lapse of time and the absence of special circumstances the bill can no longer be taxed, not to allow the reasonableness of the items to be questioned at the trial: *Anderson* v. *May* (1); *Cowdell* v. *Neale* (2); *Williams* v. *Griffith* (3); *Williams* v. *Frith* (4).

[STIRLING, J., referred to the observations of Lord *Mansfield* in *Hooper* v. *Till* (4).]

As to the practice in Chancery, the same rule prevails: *Ex*

(1) 2 B. & P. 237.
(2) 1 C. B. (N.S.) 332.
(3) 6 M. & W. 32.
(4) 1 Doug. 198.

parte Quilter (1); *In re Marseilles Extension Railway and Land Company* (2); *In re Gedye* (3).

[STIRLING, J.:—If the executor says, "There are items in the bill which I do not understand," why should not the propriety of those items be considered? It is the ordinary case of a debt being brought in for proof against the estate. Is there anything more than an admission on the testator's part?]

There is more than an admission. The executor is estopped from saying that any particular item is unreasonable. He cannot disregard the provisions of the *Solicitors Act*, 1843: *Slater* v. *Brookes* (4); *In re Johnson and Weatherall* (5).]

[STIRLING, J.:—The latter case shews that the Act cannot be accepted as a code applicable to every state of circumstances; it is an express decision that the Court can tax a portion of a solicitor's bill apart from the *Solicitors Act*, 1843.]

The question of jurisdiction was not there contested, and the case does not deal with the question as to how the jurisdiction, if it exists, is to be exercised. Until the decision in *In re Norman* (6) an extreme case of overcharge or pressure was required to be shewn to justify taxation after twelve months, and the cases at common law shew that the Court was not in the habit of taxing a bill which had been delivered more than twelve months. In *Cowdell* v. *Neal* (7) the order to tax was discharged.

[STIRLING, J., referred to *Ex parte Ditton* (8).]

Ex parte Ditton was a very strong case, and one obviously of special circumstances. The authorities were not gone into, and the question asked by *James*, L.J. (9), might safely have been answered in the affirmative. This is not a case of "moderation," nor is there any fiduciary relation between the parties. We have received notice that the bill will be taxed, and it can only be taxed in the ordinary way.

(1) 4 De G. & Sm. 183.
(2) Law Rep. 11 Eq. 151.
(3) 14 Beav. 56.
(4) 9 Dowl. 349.
(5) 37 Ch. D. 433.
(6) 16 Q. B. D. 673.
(7) 1 C. B. (N.S.) 332.
(8) 13 Ch. D. 318.
(9) 13 Ch. D. 320.

C. A.
1889
In re PARK COLE *v.* PARK

Hastings, Q.C., and *Bardswell*, for the Executor:—

It was not for the purpose of taxation that these bills were referred to the Taxing Master. There were items which were open to inquiry, *e.g.*, charges for disbursements, and a charge to the testator for a lease, which required explanation. None of the common law cases decide that if a special defence is set up it cannot be entertained. We are willing, however, to accept an order giving a direction similar to that made in *Allen* v. *Jarvis* (1). [They were then stopped by the Court.]

1888. Dec. 20. STIRLING, J.:—

In this case I have had an opportunity of looking at the authorities which were cited to me, and of considering the matter further. The present reference to the Taxing Master appears to me to have gone a little too far, and I think that the right order to make will be one similar to that made in *Allen* v. *Jarvis*, and that, upon the Plaintiff indicating what items he objects to, those items should be adjudicated upon by the Taxing Master acting simply as Chief Clerk for this particular purpose.

I will now state the reasons which have induced me to come to this conclusion.

The case is one which raises a somewhat important point of practice as to the mode of dealing with claims in respect of solicitors' bills, brought in in administration actions.

[His Lordship then stated shortly the facts of the case, and continued:—] When this claim came before me personally in Chambers, I had not the benefit of the assistance of counsel, but the solicitors in the case came before me, and it was urged by the solicitor of the Claimants that as the bills had been delivered more than a year before the death of the testator I ought not to inquire into them at all. On the other hand it was stated to be the universal practice in Chambers, when bills are brought in to refer them (even if they have been delivered in the testator's lifetime, and more than a year before his death), to the Taxing Master, not to be taxed, but simply as an officer of the Court more conversant with this class of business than the Chief Clerk,

(1) Law Rep. 4 Ch. 616.

in order that the Judge may have the benefit of his assistance in deciding upon the validity of the claim. This practice is very similar, though technically not the same, as that of referring the bills of costs of a trustee or executor to the Taxing Master to be moderated.

Having heard what was said on both sides, I made inquiry as to the practice in Chambers, and, so far as I could discover, it seemed to be the practice for the Chief Clerk to look into the bill, and to ascertain from his own examination, or from what was pointed out to him by the parties, whether there were any items in it which required investigation; and if he found that there were he referred the bill to the Taxing Master to be dealt with in the way I have mentioned, *i.e.*, not in the same way as on a taxation under the *Solicitors Acts*, which involves particular consequences as regards costs, but simply as a mode by which the claim might be investigated, the costs being dealt with in the same way as the costs of any other claim by a creditor under the administration, *i.e.*, allowed to the claimant, and added to his proof, in the absence of any impropriety of conduct on his part.

In the present case the Chief Clerk appears to have looked into the bill and found certain items which seemed to him to require explanation. Thereupon, without any special directions being given, it went before the Taxing Master, and, as I gather, he proceeded or proposed to proceed upon it as if it had been simply referred to him for taxation. To that the Claimants objected, and the matter has been brought into Court and argued before me.

Now, in dealing with solicitors' costs, the Court has a threefold jurisdiction. First, the statutory jurisdiction conferred by the *Solicitors Acts*. That jurisdiction does not, I think, come in question at all in the present case, because it is admitted that the bills were all delivered more than a year before the testator's death, and that there are no special circumstances to entitle the executor to require taxation under the provisions of that Act.

Secondly, the Court has, I apprehend, jurisdiction to deal with solicitors' bills of costs under its general jurisdiction over the officers of the Court. That, again, does not seem to me to be applicable to the present case, and I should dismiss it by so saying,

C. A.
1889
In re PARK.
COLE *v.* PARK.
Stirling, J.

had it not been contended before me that such a jurisdiction does not exist. I desire to be understood as not in any way assenting to that argument, which appears to me as at present advised to be contrary to what is laid down by each of the learned Judges who constituted the Court of Appeal in the recent case of *In re Johnson and Weatherall* (1), in which case, although undoubtedly the question was not argued out, the Court made an order for taxation of part of a bill of costs: an order which could not have been made under the *Solicitors Act*, but which the learned Judges made in the exercise, as they stated, of the general jurisdiction of the Court.

Then, thirdly, there remains the ordinary jurisdiction of the Court in dealing with contested claims. This action is one for the administration of a testator's estate, and under the judgment a claim is brought in by persons who allege that they are creditors in respect of certain bills of costs. It is contended on their behalf that the investigation of this claim which takes place in Chambers is merely in substitution for a common law action, and that the Claimants ought to be placed as nearly as may be, having regard to the different forms of procedure, in the position in which they would have been if they had brought an action at common law against the testator's legal personal representative for the amount of this bill. To that general proposition I agree. I think that is the proper way in which to look at the case.

But then it was further contended before me, that in case an action at law had been brought, there was an absolute rule of law which prevented any investigation of the bill at all, if it had been delivered for more than a year, and no objection had been raised to it; and certain cases before Lord *Mansfield*, and one before Lord *Eldon*, were cited in support of that proposition.

Of these authorities the case mainly relied upon was *Anderson* v. *May* (2), which came before Lord *Eldon*, as Lord Chief Justice of the Common Pleas, in the year 1800.

It is thus reported:—"This action was brought for business done as an attorney by the plaintiff's intestate at the instance of the defendant. At the *Westminster* sittings in this term the cause was tried before Lord *Eldon*, C.J., when, in order to prove

(1) 37 Ch. D. 433. (2) 2 B. & P. 237.

the amount of the bill, the plaintiff gave in evidence the copy of a bill delivered to the defendant in the year 1796, and which had never been referred for taxation. The defendant objected to this being received in evidence, inasmuch as no notice had been given to produce the bill delivered to the defendant. But his Lordship held that it ought to be received, and was conclusive as to the reasonableness of the charges, it being the defendant's own fault that the bill had never been taxed. A verdict was accordingly found for the plaintiff, and the point made by the defendant reserved for the opinion of the Court."

Now, according to this note, Lord *Eldon* sitting at Nisi Prius is certainly reported to have said that the bill was conclusive as to the reasonableness of the charges; and upon that, and upon some general expressions in the judgments of Lord *Mansfield*, is founded the argument that there is a rule at common law that if the client allows the time for taxation to go by, and is then sued upon the bills, he is absolutely debarred from raising any objection to the reasonableness of the charges. I confess it is somewhat difficult to see upon what ground a rule of law so stringent could be based.

Looking at that case, and several others to which I was referred by Mr. *Grosvenor Woods*, I think the real state of the case is this: The Courts of Common Law dealt with an action on a solicitor's bill of costs in the same way as they would deal with an action on an ordinary tradesman's bill containing a number of items. If it were shewn that the bill had been delivered for a considerable time, and had never been objected to by the person to whom it had been delivered; and if the bill on the face of it seemed to be fair and reasonable, a jury would no doubt be told that, in the absence of anything to the contrary, it was conclusive against the person charged and that they ought in such a case to find a verdict for the plaintiff. Applying that to the case of a solicitor's bill, if such a bill has been delivered for more than a year, and the person to whom it was delivered has never sought to have it referred to taxation, or made any objection to it, and the bill on the face of it appears to be a reasonable bill, and contains no extraordinary charges, then it would seem a very reasonable thing that the jury should be told that the defen-

C. A
1889
In re
PARK
COLE
v.
PARK
Stirling, J.

dant in the action ought not now to be allowed to question the bill if he has nothing to allege against it, and that as against him a verdict should go for the plaintiff for the amount of such reasonable bill.

But I cannot believe that the very eminent Judges whose decisions have been referred to ever meant to lay down as an absolute rule that under no circumstances could the bill be looked into after the period for taxation has elapsed.

For example, supposing it were stated and proved that the person charged had, during the whole period from the delivery of the bill to the bringing of the action been incapacitated by ill health from attending to business, and suppose further that, when the bill came to be looked into, it contained, on the face of it, charges that were evidently exorbitant; for example, suppose every letter written was charged at two guineas, instead of the ordinary charge, I cannot conceive that Lord *Mansfield* or Lord *Eldon*, or any other Judge, ever meant to lay down the rule that under such circumstances, simply because the bill had been delivered for more than a year and had never been referred to taxation, the Judge was bound to direct the jury that the charge was a reasonable one for the solicitor to make; and that in spite of any explanation that might be given on behalf of the defendant they must at once return a verdict against him for the amount.

It appears to me that the Judges treated the non-taxation of the bill within the year after its delivery as an admission by the defendant that the bill was a reasonable one and was due; but an admission which, like every other admission, could be explained by evidence as to the circumstances under which it was not taxed, or as to the amount of the bill. In substance this agrees with the remarks made by the Lords Justices *James* and *Cotton* in *Ex parte Ditton* (1). In that case Lord Justice *James* says (2): "If the solicitor brought an action for the amount of his bill, the client might take the case before a jury. A solicitor has no absolute right to the taxation of his bill." And Lord Justice *Cotton*, says: "If the client had not applied to have the bill taxed, that would be a strong point against him. But taxing is not the only way of ascertaining what is due." The Lord

(1) 13 Ch. D. 318. (2) 13 Ch. D. 319.

Justice, therefore, seems to have been of opinion, in entire agreement with the common law authorities, that if the client does not object to the bill, and makes no effort to get it taxed, but allows a long time to elapse—*à fortiori*, if he makes a payment on account—those are very strong circumstances against him, and without further explanation would probably be held to be conclusive against him.

Coming, then, to the conclusion that there is no absolute rule but merely a presumption to be drawn *primâ facie* from the facts of the case, I think that in this case the reference to the Taxing Master has gone too far. Certain items in the bill have been pointed out which call for further explanation, and the Taxing Master, being the officer of Court who in the ordinary course is charged with that class of business, is the proper officer to hear the explanations and to decide upon them in the first instance. But I think that the bill ought not to have gone to him upon a reference in such a form that he might fairly infer that he was meant to tax it, just as it had come before him for taxation in the ordinary way. That was not meant, and in that respect the reference has gone too far.

Mr. *Graham Hastings* is willing that an order should be made similar in form to that in *Allen* v. *Jarvis* (1), where charges in a bill of costs were sent to the Taxing Master to be moderated. In that case the order which was ultimately made was a direction that the Taxing Master should inquire, and state whether any of the disputed items marked in red ink in the bill were fair and proper amounts, and should be allowed respectively. And I propose in this case to give a similar direction.

As regards the mode in which the Taxing Master is to deal with the matter, I do not desire to fetter him; but I may state that in my opinion the solicitors ought to have the benefit of any presumption which may arise from the fact that the bills were delivered so long before the testator's death, and that the testator made no complaint about them.

That is not to be embodied in the formal order, but is merely an intimation of my opinion as to the way in which the Taxing Master should deal with the disputed items.

(1) Law Rep. 4 Ch. 616.

C. A.
1889
In re PARK.
COLE v. PARK.
Stirling, J.

The costs of the reference to the Taxing Master will be dealt with in the ordinary way as part of the proof of the Claimants in the administration action. If they are guilty of no impropriety of conduct, they will *primâ facie* be entitled to those costs. But, of course, the Court retains complete control over those costs, as it does in the case of any other claim that is brought into Chambers. As regards the present application, the costs of the Claimants should be added to their proof, and those of the executor should be costs in the action.

W. W K.

The order was "That it be referred to the Taxing Master to inquire and state whether any and which of the items to be marked by the Plaintiff in red ink in the four several bills of costs (describing them), and which the Plaintiff, the surviving creditor of the said *J. C. Park*, shall dispute, are fair and proper to be allowed, and to what amount respectively." The claimants to add their taxed costs of the application to their claim, and the costs of the Plaintiff to be costs in the action.

C. A.

The solicitors appealed from this order, and the appeal was heard on the 5th of April, 1889.

Grosvenor Woods, for the Appellants:—

The Appellants believe that the order will practically do them little or no harm, but the case is important as one of principle. This is a claim made in an administration suit, and must be treated in the same way as if the solicitors were suing the testator at law for the amount of their bill. In that case the client having allowed twelve months to elapse without applying for taxation, and without taking any objection to the bill, would be taken to have admitted its reasonableness, and judgment would be given for the full amount. No special circumstances being alleged, an order to tax could not have been obtained, and accordingly in *Ex parte Quilter* (1) payment in full of a bill so circumstanced was ordered. In the case of *In re Marseilles Extension Railway and Land Company* (2) taxation was ordered on the ground that a bill against a company had not been delivered twelve months

(1) 4 De G. & Sm. 183. (2) Law Rep. 11 Eq. 151.

before the winding-up order, a ground which it would have been unnecessary to take if there had been a general right to tax. In *De Bay* v. *Griffin* (1) the point was raised, but did not call for decision. In *Anderson* v. *May* (2) Lord *Eldon* said that the bill in that case was conclusive as to the reasonableness of the charges, having been retained by the client for a long time without taxation, and *Hooper* v. *Till* (3) supports the same view. The large payment on account is a very strong circumstance in our favour. *Ex parte Ditton* (4) was a very peculiar case, and the decision is to be referred to its special circumstances. The *Solicitors Act* is in my favour, it was intended to provide clients with a speedy mode of ascertaining whether bills of costs were reasonable, and if they do not resort to it, the conclusion that they admit the bills to be reasonable is strengthened. After such a lapse of time as here there ought not to be any reference to the Taxing Master—a reference to moderate ought only to be directed in a strong case, not one where there are merely items which may be open to criticism. Moreover, no order ought to have been made without some *primâ facie* evidence that the items were unreasonable.

Hastings, Q.C., and *Bardswell*, for the executor, were not called upon.

COTTON, L.J.:—

This is an appeal from an order of Mr. Justice *Stirling* by which he has not referred the Appellant's bills of costs generally for taxation, but has referred it to the Taxing Master to inquire and state whether any and which of the items to be marked by the Plaintiff in red ink in the four several bills of costs delivered by the Appellants are proper or not.

That order is objected to, and I have a difficulty in seeing exactly upon what ground it is objected to, except that it is said to be a matter of principle. Now what are the facts of this case? The solicitors delivered their bills of costs much more than a twelvemonth before the death of the testator, he paid money on account, and had not referred the bills for taxation, nor in any

(1) Law Rep. 10 Ch. 291.
(2) 2 B. & P. 237.
(3) 1 Doug. 198.
(4) 13 Ch. D. 318.

C. A.
1889
In re PARK.
COLE *v.* PARK.
Cotton, L.J.

way objected to them. It is not contended that there are any special circumstances which would entitle the client to have the bills taxed under the *Solicitors Act* after the length of time that has elapsed. But that to my mind does not settle the question. The solicitors are bringing in a claim against the estate of the deceased client, and that claim is to be dealt with as if it was an action at law. If it were so, of course the fact of the testator's having had those bills of costs so long without making any objection is *primâ facie* evidence in favour of their being right, but it is nothing more than *primâ facie* evidence, and if any objection were taken that objection would have to be considered, and the matter would have to be dealt with upon hearing the evidence on both sides, unless it could be referred to the Taxing Master, who is the usual and proper person to decide whether costs are reasonable.

Cases at common law were referred to in argument, viz.: *Anderson* v. *May* (1), which was mainly relied on, and *Hooper* v. *Till* (2). In *Anderson* v. *May* the matter brought before the Court does not seem to have been the question raised here, but whether a copy of the bill of costs had been properly admitted in evidence. Assuming it was, it would only come to this, that the delivery of the bill a long time ago and its not being objected to were some evidence that the costs were reasonable and proper. In *Hooper* v. *Till*, before Lord *Mansfield*, judgment had been obtained by the production of the bill which had been delivered and not objected to, and there was a motion to set that aside, and that the bill should be referred to the Master for taxation. All that was actually decided was that the bill could not be referred for taxation, which is quite consistent with the view, that though the delivery of the bill of costs and its not being objected to for a length of time is *primâ facie* evidence in favour of the bill, it does not prevent objections being taken to particular items.

In the present case the Plaintiff objects to certain items, and those items were pointed out, as I understand, to the Chief Clerk, and he proposed to refer the bill generally for taxation. That Mr. Justice *Stirling* considered to be wrong, and thought that the inquiry ought to be limited to the question whether the

(1) 2 B. & P. 237. (2) 1 Doug. 198.

items objected to were or were not to be allowed as proper charges to be made by the solicitors. Mr. Justice *Stirling* considered that regard was to be had to the fact that the client had the bills in his possession for a long time and raised no objections to them, but objections now being taken to them, he required that the items which were objected to should be pointed out. and referred those items to the Taxing Master. It was urged that this ought not to have been done without some evidence being brought before the Judge that these items were improper items, and then the solicitor would have had an opportunity of meeting that by filing affidavits. But, having regard to the general practice that when a claim made for a solicitor's bill in an administration suit is opposed the bill is referred to taxation, if the Plaintiff had brought in long affidavits specifying objections to these items he might probably have been told "you ought never to have incurred this expense, and you must pay the costs of so doing." Therefore, in my opinion, the course that was taken by the learned Judge was the right one; he would not have a fight of affidavits before him upon these items, but at once referred the disputed items to the reasonable tribunal for settling these questions, viz. the Taxing Master's office. There really is no question of principle in the case, unless it is contended as a matter of principle that the Judge in Chambers cannot take the least expensive mode of ascertaining whether the objections are well or ill-founded. In my opinion, therefore, this appeal is wrong, and must be dismissed.

LINDLEY, L.J.:—

I am of the same opinion. I think that Mr. Justice *Stirling* has taken the correct view of this matter. We must bear in mind what the case is. It is a claim by a creditor in an administration action, and it is open to the executor to take in the ordinary way any objection which may arise to the allowance of the claim. Now it is true that if a signed bill has been delivered by a solicitor, and has been kept without objection for twelve months, and part of it has been paid, that is *primâ facie* evidence of its reasonableness, and Mr. Justice *Stirling* has adopted that view; but it is not conclusive evidence of reasonableness. The executor says that there are some items in the

C. A.
1889
In re PARK.
COLE *v.* PARK.
Lindley, L.J.

bills which are unreasonable, and the learned Judge rightly says, "We will have those items inquired into." Then comes the question as to the right way of doing it. Is it to be done before him upon affidavits in Chambers? Mr. Justice *Stirling* preferred the less expensive course of referring the items to the Taxing Master. He considered that it would be wrong to send the bill generally to be taxed by the Taxing Master, which would let in the rule as to costs in case of one-sixth being taxed off. The client having had the bill so long without objection is treated as *primâ facie* evidence of its reasonableness, but the Judge says if there are any items which require investigation, I will have those items inquired into. That seems to me to be quite right in point of principle, and to be also extremely reasonable in point of practice.

FRY, L.J.:—

I am of the same opinion.

The only case on which Mr. *Grosvenor Woods* strongly relied was *Anderson* v. *May* (1). That case, so far as it was before the Court of Common Pleas, does not give any help at all in the present case. The only portion of the case which is really of any assistance to the argument here, is that Lord *Eldon* sitting at *Nisi Prius*, at the time he was Lord Chief Justice of the Common Pleas, held this, "The defendant objected to this" (that is a copy of the bill) "being received in evidence, inasmuch as no notice had been given to produce the bill delivered to the defendant. But his Lordship held that it ought to be received, and was conclusive as to the reasonableness of the charges, it being the defendant's own fault that the bill had never been taxed." I confess I extremely doubt whether Lord *Eldon* meant that it was conclusive evidence, I think he only meant that it was evidence, and that if no evidence to the contrary was offered it would be conclusive evidence that the bill was reasonable. I think that the view of the authorities which was taken by the learned Judge in the Court below is quite correct.

Solicitors: *Powell & Rogers*, agents for *Longcroft & Green, Havant*; *G. C. Sherrard*, agent for *New & Co., Evesham.*

(1) 2 B. & P. 237.

H. C. J.

AYSCOUGH *v.* BULLAR.

C. A.
1889
April 11.

[1888 A. 1370.]

Practice—Amendment—Adding Plaintiff—Rules of Supreme Court, 1883, *Order* XVI., *r.* 2.

A Plaintiff claimed an injunction or damages against the Defendant for an alleged violation of a covenant restraining her from building in a particular manner. After the commencement of the action the Plaintiff was advised that there was something in her title which might act as a personal bar to her obtaining relief; and she accordingly applied for leave to amend by making the owner of a neighbouring house, who, she alleged, was entitled to the benefit of the same covenant, a co-Plaintiff:—

Held (reversing the decision of *North*, J.), that, as the real question was the effect of the covenant, the amendment ought to be allowed.

Walcott v. *Lyons* (1) distinguished.

THIS was an appeal from an order of Mr. Justice *North* made at Chambers on the 25th of March, 1889, refusing leave to the Plaintiff, *May Ayscough*, to amend the writ by adding the name of *H. Ayscough* as a co-Plaintiff.

The Plaintiff was the owner in fee of No. 3, *Lower Prospect Place, Southampton.* The Defendant, Mrs. *Bullar*, was owner in fee of No. 1 in the same street. Captain *H. Ayscough*, whom it was proposed to make co-Plaintiff, was the Plaintiff's brother and the owner in fee of No. 4. *Thomas Williams*, then the owner of the mansion-house and grounds of *Prospect Place*, which comprised the sites of all the above-mentioned houses, by deeds of lease and release dated the 9th and 10th of September, 1812, conveyed the site of No. 1 to *John Bullar*, under whom the Defendant claimed, in fee. The deed of release contained a covenant by *John Bullar* with *T. Williams*, his heirs and assigns, that *J. Bullar*, his heirs and assigns, would not build the front or west wall of his then intended dwelling-house on the said land so as to project or extend beyond the then present line of building of the front or west part of the copyhold messuage called *Prospect Place.*

The mansion-house called *Prospect Place* was afterwards

(1) 29 Ch. D. 584.

C. A.
1889
AYSCOUGH
v.
BULLAR.

divided into three houses, which became Nos. 2, 3 and 4 in *Lower Prospect Place*, and *T. Williams* conveyed Nos. 2 and 3 to *A. Mackenzie* in fee, who sold them to *J. Bullar*. *J. Bullar* sold No. 3 to *E. Hoskins*, under whom the Plaintiff claimed.

In 1813 *T. Williams* conveyed No. 4 to the predecessor in title of Captain *H. Ayscough*.

The Defendant had commenced to build a wall in front of No. 1 which advanced beyond the building line mentioned in the deed of the 10th of September, 1812, and the Plaintiff contended that the restrictive covenant was intended for the mutual benefit of the owners of all the houses built on *T. Williams'* property in pursuance of a building scheme, and commenced the present action against the Defendant and her tenant *Dunsford* to restrain the erection of any building on the land in front of No. 1 which should extend beyond the building line mentioned in the covenant.

Before the action both the Plaintiff and her brother had complained of the building of the wall and it was determined to bring an action in the Plaintiff's name.

After the action was commenced the Plaintiff was advised that there was a difficulty in maintaining the action in consequence of her having derived the title to her house through *J. Bullar*, who was the covenantor in the deed of the 10th of September, 1812, and she thereupon applied for leave to amend the writ by making Captain *Ayscough*, who derived the title to his house, No. 4, from *T. Williams* independently of *Bullar*, to be joined as co-Plaintiff. Mr. Justice *North* refused the application and made the costs costs in the action.

The Plaintiff appealed.

Cozens-Hardy, Q.C., and *Colt*, for the Appellant:—

Our application is under Order XVI., r. 2 (1), which gives the

(1) Order XVI., r. 2: "Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a Judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just.

Court wide powers in permitting amendment: and has always been liberally construed by the Court. The Court will always give leave to amend if the amendment will assist the trial of the real question in the action, and if no injustice is done to the other party: *Broder* v. *Saillard* (1); *Duckett* v. *Gover* (2); *Walcott* v. *Lyons* (3). The last-mentioned case was considered in *Carswell* v. *Hyland* (4). In the present case the real point in dispute is the effect of the covenant of *J. Bullar* in the deed of the 10th of September, 1812, but the Plaintiff is advised that there is a personal bar to her maintaining the action, and she therefore wishes to join her brother, Captain *Ayscough*, so that the question may be fairly brought before the Court. It was a *bonâ fide* mistake. The true state of the title was not discovered till after the action was commenced: *Gandy* v. *Gandy* (5); *Steward* v. *North Metropolitan Tramways Company* (6). There will be no injustice done to the Defendant, for the question will have to be tried in some way or other, and it is better to go on with this action than to have a new one.

Everitt, Q.C., and *Maidlow*, for the Defendant:—

This case does not come within the scope of the rule referred to. We admit that the Court has jurisdiction to make an amendment whenever it thinks it just, but it has never done so in such a case as this. The Plaintiff and Captain *Ayscough* have totally distinct causes of action. Their properties are distinct and held under distinct titles; it is not like a case where trustees are suing on behalf of *cestuis que trust*, when the Court will add or substitute a plaintiff in order that the beneficiaries may obtain relief: *Mason* v. *Harris* (7); *Renals* v. *Cowlishaw* (8). There is no building scheme in this case, there was only a simple covenant by *J. Bullar* that he would not build his house in a particular manner, and he never broke that covenant. The Plaintiff shews no ground for applying that covenant to the present circumstances or to her own house. If Captain *Ayscough* has any claim it must

(1) 2 Ch. D. 692.
(2) 6 Ch. D. 82, 86.
(3) 29 Ch. D. 584.
(4) 3 Times L. R. 708.
(5) 30 Ch. D. 57.
(6) 16 Q. B. D. 556.
(7) 11 Ch. D. 97.
(8) Ibid. 866.

C. A.
1889
AYSCOUGH
v.
BULLAR.

be on a different ground, and ought to be tried in an independent action. Moreover he would not be entitled if he succeeded to the same relief as the Plaintiff; for he does not make his complaint till the wall has been finished, and therefore could not obtain a mandatory injunction to pull it down, which the present Plaintiff claims.

If the amendment is allowed the Plaintiff ought to pay all the costs here and below, and Captain *Ayscough* ought to be restricted to such relief as he could have obtained if the action had been now first brought.

COTTON, L.J.:—

This is an application by way of appeal for liberty to amend by adding as a Plaintiff the brother of Miss *Ayscough*, and it is made under rule 2 of Order XVI., which is this:—[His Lordship read the rule.] Now what is this action? It is an action by the owner of the house, No. 3, *Lower Prospect Place*, to restrain an act which has been done by the Defendant, Mrs. *Bullar*, which is considered injurious not only to the Plaintiff but to her brother, who is the owner of a neighbouring house. He wrote letters in his own name before action complaining of this act, but it was decided ultimately that it was a prudent thing to bring the action in the name of the lady, because it was supposed there might be a bar which might prevent him from bringing the action. Therefore the action was brought in her name. It turns out that if there is any bar at all, it is a bar against her, because there had been a union of title in the two properties of the Defendant and the present Plaintiff, Miss *Ayscough*. That being so it was doubtful whether the Plaintiff was the right Plaintiff, and upon the affidavits I think it can hardly be denied that if it was a mistake, it was a real and *bonâ fide* mistake.

Then ought we to grant leave to amend? Mr. *Everitt* wanted to go into the question whether either of the Plaintiffs could ever get any relief; but I decline to go into that. One would hardly suppose that counsel would apply for leave to amend to make a person a Plaintiff in an action which would necessarily and obviously fail; but if the case is brought before us further, the arguments upon it will be addressed to us if necessary. The

case here is that the Plaintiff, the lady, wants to enforce a covenant contained in a deed by which the Defendant Mrs. *Bullar* is bound; it is her root of title, and the covenant was entered into by her husband, who was her predecessor in title, and in order to determine the question and the liability under that covenant it is necessary that there should not be any personal objection taken to the Plaintiff, Miss *Ayscough*, but that there should be a plaintiff against whom there is no personal objection.

What is urged upon us on the other side is, that this covenant could not apply to this case. That is the real question, and not the question whether Miss *Ayscough* can claim the benefit of the covenant. It is a substantial question, and I give no opinion upon it, as to whether the effect of the covenant is what Mr. *Cozens-Hardy* contended for, or that which Mr. *Everitt* says is the clear meaning of the covenant. That is the question. It is not like the question as to whether Miss *Ayscough* could obtain relief under the covenant or whether Captain *Ayscough* could; but as to what is the true meaning and construction of this covenant as affecting the other houses in *Lower Prospect Place*? The substance of the question is, what is the meaning of the covenant? In my opinion this is a case in which we ought to allow the amendment to be made if the Plaintiff has been made Plaintiff under an honest mistake.

The only case which has been really relied on is the case of *Walcott* v. *Lyons* (1). There a man had asked his trustees to invest in a certain security which was not justified by the trust, and the trustees said, "We did this at your instance; it is not a question therefore whether it is a breach of trust or not, but whether it was done at your instance," and we thought that if that was made out, the action, if it was tried, would fail; and it would, therefore, be wrong to let a person who was not a party to the application to be made a plaintiff when the question to be raised was not whether it was a breach of trust, but whether it was done at the instance of the original plaintiff. That case does not in my opinion bear upon the present, and it appears to be the only one really relied upon. The other cases are not exactly like

(1) 29 Ch. D. 381.

C. A
1889
AYSCOUGH
v.
BULLAR
Cotton, L J

this, but they go upon the same principle, that the Court will protect the defendant from any injustice being done to him, and will enable the proper parties to be made plaintiffs in order that the real question may be tried. In this case the real question is what is the true effect of this covenant, and whether it applies to the act which the Defendant is now doing? We think that allowing the amendment to be made must be upon the terms that if on the trial it appears that the first Plaintiff, Miss *Ayscough*, is not entitled to maintain the action, and that Captain *Ayscough* is so entitled, she must pay the costs of the action up to the time of the joinder of Captain *Ayscough*; and further, that he will only be entitled to such relief as he could have claimed if the action had commenced at the time of his joinder as Plaintiff. Then what ought to be done with regard to the costs of this application? I think that the Plaintiff must pay the costs. It is an indulgence to her, and it is an indulgence by way of giving her a better security, and if it is done by way of security in order to protect her title then she must pay the premium for that protection.

The Plaintiff, Miss *Ayscough*, will therefore pay the costs and be at liberty to amend on the terms I have already stated.

LINDLEY, L.J.:—

I quite agree. First of all, does this case fall within Order XVI. rule 2? The case of *Walcott* v. *Lyons* (1) does not turn upon that rule at all. I will not say any more about that as it has been already dealt with by Lord Justice *Cotton*. In considering Order XVI., rule 2, we must bear in mind that the mistake which is to be redressed by the application of the rule is a mistake in one person finding out by some means or other that he cannot get the full relief which he seeks without joining some other person as co-plaintiff. The whole object to be obtained by amending and adding a co-plaintiff is to better the position of the first plaintiff. This is not like the case that has been dealt with by Lord Justice *Cotton*. Here the original Plaintiff seeks to enforce an obligation on the part of the Defendant by virtue of a certain building covenant. Nobody who has any experience in this class of cases

(1) 29 Ch. D. 584.

can fail to be convinced that it is often very difficult to find out what obligation is in existence, and who is the proper person to sue. On going into the division of the property and dealing with the various lots, and so forth, you sometimes lose sight of the real parties, or it is difficult to find them. There is scarcely a more difficult problem than to find out who is the right plaintiff. Miss *Ayscough* thought she was the right Plaintiff. She is interested in and seeks to enforce the covenant. She finds out, not that she is wrong, but she begins to suspect that she can better prove her case if she can join her neighbour, who is also interested in the same building covenant, and she thereupon asks leave from the Court to add him as a plaintiff. Now it appears to me that, when once you are satisfied that there has been a *bonâ fide* mistake, that the whole thing is honest, and that it is necessary in order to do justice to her and to the Defendant that she should have this liberty to amend, such liberty ought to be granted. Of course it will be upon terms, and those terms have been mentioned by Lord Justice *Cotton* in his judgment, and I will not repeat them.

With respect to the costs, I think it is quite right that Miss *Ayscough* should pay the costs of this particular application. It is really to better her position and for her better security. There may have been an oversight, for that there is no blame to be attached to her. If there has been some oversight or some error in judgment, and she thinks by taking extra caution she can better her position, she is entitled to do so, but we cannot make the Defendant pay for that. It is an indulgence given to her, and for that she must pay. We do not interfere with the costs in the Court below.

Solicitors: *Peacock & Goddard*, agents for *Sharp, Harrison, & Turners, Southampton*; *Stocken & Jupp*, agents for *W. A. Lomer & Son, Southampton*; *R. R. Linthorne, Southampton.*

M. W.

C. A.
1888
KEKEWICH. J.
Aug. 6, 7, 8.
C. A.
1889
April 10, 12.

ARNISON *v.* SMITH.

[1887. A. 1361.]

Prospectus—Misrepresentation—Action of Deceit—Circular to correct Error in Prospectus.

Persons took debenture stock in a company in reliance on a statement in a prospectus issued by the directors that £200,000 of share capital had been subscribed, when it had in fact only been allotted in fully paid-up shares to the contractor. £20 per cent. of the amount subscribed for was to be paid on allotment, and the rest by instalments, with an option to pay up in full on allotment and receive a discount. After allotment the directors sent to the allottees along with their stock certificates a circular which, amid statements about other matters, stated the truth as to the matter misrepresented, but did not admit the misrepresentation, nor inform the allottees that they could retire and get back their money. After this the allottees who had paid up in full, received their discount, and those who had not, went on paying up the remaining £80 per cent. by instalments. The concern having proved a failure, some of the debenture stock holders sued the directors to recover damages for misrepresentation:—

Held (affirming the judgment of *Kekewich*, J.), that the untrue statement in the prospectus was to be taken as inducing the allottees to enter into the contract, and entitled the allottees to damages, and that its effect was not done away with by the circular, and that the allottees who went on to pay up in full after receiving the circular could recover damages for the loss of the money paid by them after receiving it, as well as in respect of what they had paid at first.

How the case would have stood if the circular had admitted the misrepresentation and informed the allottees that they could have their money back, *quære.*

Some of the Plaintiffs were absent from illness at the trial and no evidence was given to prove their individual cases, *Kekewich*, J., gave judgment in favour of those Plaintiffs who proved their cases, but ordered those who did not appear to pay to the Defendants the costs occasioned by their being joined as Plaintiffs:—

Held, on appeal, that this judgment ought to be varied as regards these latter Plaintiffs by making it without prejudice to their bringing a fresh action.

THIS was an action for damages on the ground that the Plaintiffs had been induced by fraudulent misrepresentations to take debenture stock in the *City of Genoa Waterworks Company.*

The company was incorporated on the 1st of November, 1886,

as a company limited by shares, with a nominal capital of £300,000 in £5 shares, and with power to raise £300,000 by issue of debenture stock.

The alleged misrepresentation was contained in a prospectus issued by the directors on the 30th of November, 1886, inviting subscriptions for £150,000 debenture stock of the company at par. This prospectus was headed "Issue of £150,000 £6 per cent. debenture stock ranking in priority to £300,000 share capital (£200,000 of which has been subscribed) bearing interest from the 1st of November, 1886, and secured as a first charge on the entire assets and property of the company and the concession granted by His Majesty the King of *Italy* herein described." In the body of the prospectus was the following statement: "Share capital £300,000, in 60,000 shares of £5 each, of which 40,000 shares, representing £200,000, have been already subscribed." £5 per cent. was to be paid on application, £15 more on allotment, £30 more on the 6th of January, 1887, and the remaining £50 on the 26th of February, 1887, but liberty was given to pay up in full on allotment at a discount.

At the time when the prospectus was issued the only shares subscribed for in the ordinary sense of the term were the seven shares of the seven subscribers to the memorandum of association, and by the 7th of March, 1887, when the first return was made to the Joint Stock Companies Office, only three more shareholders had come in, for fifty shares in all. The statement that £200,000 had been subscribed was based on the following facts:

By a contract dated the 4th of November, 1886, between the company and the Defendant *Gordon Smith, Gordon Smith* had agreed to construct the waterworks for £400,000, of which £300,000 was to be in cash and £100,000 in fully paid-up shares. £50,000 was to be paid in cash on or within one month after the signing of the agreement. The company agreed by this contract to issue prospectuses, in such form as should be agreed upon between them and the contractor, inviting subscriptions for the share and debenture capital of the company.

The concession was at the time of the incorporation of the company vested in *Gordon Smith,* who at the time of the issue of the prospectus had agreed to sell the concession to the company

C. A.
1889
ARNISON
v.
SMITH.

for £100,000 in fully paid-up shares, though the agreement was not reduced into writing till March, 1887.

Immediately after this prospectus had been issued and had appeared in the newspapers, General Sir *Richard Pollock*, who was not a director but was one of the trustees for the debenture stock holders, remonstrated with the directors for stating in the prospectus that £200,000 had been subscribed, which he considered to be a misrepresentation, and on the 7th of December, 1886, his solicitors wrote to the solicitor of the company proposing that before the debenture stock was allotted a circular should be sent to the applicants explaining the true state of the case. A suggested form of circular accompanied this letter, which briefly stated that the directors thought it right to explain a misconception about the prospectus, and that the £200,000 had been subscribed by the contractors as fully paid-up shares, £100,000 being the price of the concession, and the remaining £100,000 being taken by the contractors in part payment of the contract price. Annexed to the proposed circular was a form of request for the applicant to sign if he still wished to have the stock.

In the meantime various persons, including the Plaintiffs, had applied for allotments of debenture stock to the amount of £50,500, and at a board meeting held on the 7th of December, 1886, the sums of stock so applied for were allotted, the abovementioned letter of that day not having been communicated to the directors, and allotment letters were issued.

On the same 7th of December the solicitor to the company replied to Sir *Richard Pollock's* solicitor defending the statement that £200,000 had been subscribed, which, it appeared, had been fully discussed between the directors and their solicitor when settling the prospectus. Sir *Richard Pollock* threatened an action, and on the 16th of December an agreement was come to between the directors and the trustees for the debenture stock holders, by which it was, among other things, agreed that the company should send to each subscriber for debenture stock a circular in a form agreed upon.

On the 17th of December, 1886, provisional certificates for debenture stock were sent to the allottees with the following circular:

"I am instructed by the directors to send you provisional certificate, No. ——, being for £—— 6 per cent. debenture stock of this company £—— paid, duly registered in your name, and to request that an acknowledgment of the same be forwarded to me by return of post. I also send you herewith a cheque for £——, the discount to which you are entitled on prepayment.

"The directors instruct me to take this opportunity of informing you that a question has been asked as to the statements contained in the first paragraph of page 3 of the prospectus. I am to say that the facts, more fully stated, are, that the concession does not compel the company to supply any one, not even public institutions, with water, but that the disposal thereof is entirely in the discretion of the company, and there is no restriction in any manner as to the rates which the company may think fit to charge, while the directors are advised and believe that the concession amounts to a complete monopoly of the only practical sources of supply. I am further to say that the Italian Government have reserved no right whatever to enter into or claim possession of the works at the expiration of the time granted by the concession.

"My directors now instruct me to inform you that the unsubscribed balance of share capital, namely, £100,000, in £5 shares, is now offered to the present debenture holders. The £200,000 share capital mentioned in the prospectus as having already been subscribed is an amount which has been appropriated to the contractors, to be issued to them as fully paid-up shares in payment for the concession, and in part payment of the contract price for the construction and completion of the works, and maintenance of the same for twelve months after.

"If you are desirous of subscribing for any portion at par of the £100,000 unallotted, please fill up and return to me the accompanying application form.

"You will oblige me by filling up and returning to me by the next post the form at the foot hereof."

The substantial part of the form at the foot was: "I beg to acknowledge the receipt of your circular letter of the —— inst., and also certificate for £—— 6 per cent. debenture stock, duly registered in my name. I also acknowledge receipt of

C. A.
1889
ARNISON
v.
SMITH.

cheque for £——, the discount to which I am entitled upon prepayment."

Some of the allottees on receiving this circular desired to withdraw, and on the 20th of December, 1886, cheques for sums amounting to £1540 were sent to those who had then withdrawn, being the amount of the sums they had paid. Others, to the amount of about £6000, afterwards withdrew, and received their money back. The Plaintiffs were fifty-four in number, and were severally allottees for sums of stock amounting in all to about £29,000, and none of them withdrew. Most of them had paid up in full on allotment, so as to be entitled to discount, and these all received cheques for the discount with the circular. The others had paid the prescribed instalments on application and allotment, and subsequently paid up the remaining instalments to the full amount of the stock for which they had subscribed. All signed and returned the form at the foot of the circular, and those who were entitled to discount received it.

The company proved a disastrous failure, and on the 12th of October, 1887, the Plaintiffs commenced this action against *Gordon Smith* and the directors, alleging that the Plaintiffs had severally taken their stock in reliance on the above representation in the prospectus; that the representation was false in fact; that the Defendants made the representation falsely and fraudulently, and well knowing the same to be untrue, or else so recklessly and carelessly that they must be taken to have known the falsehood thereof; that the company was insolvent, and the debenture stock worthless; and the Plaintiffs claimed damages for the deceit and misrepresentation contained in the prospectus.

Two of the Plaintiffs died before the trial; forty appeared and gave evidence on their own behalf, and twelve did not appear to give evidence. All who were examined said that they took stock in reliance on the statements in the prospectus—some attaching more importance to one point and some to another, but most of them laid stress on the statement as to the £200,000. As regards the circular they differed considerably; some appeared not to have understood it; others thought that they had lost their money, but took no steps at all; some went to the office of the company and could not find any one there; and the whole of them had let

matters drift without taking any active steps to be released from their bargain; and they received interest, which was paid down to a period after the commencement of the action.

The action came on for hearing before Mr. Justice *Kekewich* on the 6th of August, 1888.

R. Neville, Q.C., *Oswald*, and *W. Baker*, for the Plaintiffs:—

The statement in the prospectus that £200,000 of share capital had been subscribed was material and was untrue, and induced the Plaintiffs to enter into the contract to take debentures. They are therefore entitled to damages for the misrepresentation: *Redgrave* v. *Hurd* (1); *Smith* v. *Chadwick* (2); *Peek* v. *Derry* (3). As to the measure of damages, the evidence shews that nothing has practically been done under the concession, and the time limited under it for the completion of the works runs out in a few months. It is, therefore, worthless, and the debentures are worthless, and the Court should assess the damages on that footing. As to the form of the action, it was competent for the Plaintiffs, having the same cause of action against the same Defendants, to combine and save expense: Order XVI., r. 1; as to the two who are dead, there should be no order: Order XXXVI., r. 32; and as to those who failed to appear to give evidence, the action should be dismissed without costs.

Brice, Q.C., and *Bray*, for the Defendant *Gordon Smith*:—

The use of the word "subscribed" in the prospectus was under the circumstances justified. It means underwritten, and does not necessarily mean subscribed by the public in the popular sense of the word, and the Court will not construe the word too strictly: *Henderson* v. *Lacon* (4). The directors acted honestly, and if this were an action for rescission the Plaintiffs could not succeed: *Kennedy* v. *Panama Royal Mail Company* (5); *Bear* v. *Stevenson* (6); *Cargill* v. *Bower* (7). There has been no failure of consideration. The Plaintiffs have got what they bargained for, viz., debenture stock which is a first charge on the concession.

(1) 20 Ch. D. 1.
(2) 9 App. Cas. 187.
(3) 37 Ch. D. 541.
(4) Law Rep. 5 Eq. 249, 258.
(5) Ibid. 2 Q. B. 580.
(6) 30 L. T. (N.S.) 177.
(7) 10 Ch. D. 502.

C. A.
1889
ARNISON
v.
SMITH.

The evidence shews that it is of some value, that some work has been done under it, and that there is a reasonable expectation that it will be renewed, and it may be worth double the amount of the charge. There is no evidence of any real damage; at any rate, there must be an inquiry. Further, the Plaintiffs have lost their right by laches. The rule in actions for rescission that a plaintiff must come promptly to the Court for relief applies with equal force in such an action as this.

Warmington, Q.C., and *Alexander*, for four of the directors:—

The statement in the prospectus was not made recklessly or wilfully, but after much consideration and under legal advice, and in the honest belief that the position of affairs warranted the use of the word "subscribed," for the contracts had been signed. The *bona fides* of the directors is shewn by their sending out the second circular directly they found there was a doubt about the point, and all those who applied to have their money returned, got it. The Court must be reasonably satisfied that the Plaintiffs would not have taken the debentures if the true facts had been before them: *Peek* v. *Derry* (1). But the evidence fails to shew this, and on the contrary the Plaintiffs after they knew the real facts did not repudiate the contract. They in fact elected to abide by the contract, for they paid their money and received two half-yearly payments of interest, and cannot now be heard to say that they have been deceived. They cannot take the fruits of their contract and yet sue for damages: *Arkwright* v. *Newbold* (2); *Twycross* v. *Grant* (3). As to damages, on the circular they could have had their money back, but they stood by, and cannot by their delay increase the burden on the Defendants. Therefore the damages to be assessed must be small or *nil*. As to the Plaintiffs who have not appeared personally and tendered evidence, the action must be dismissed as against them with costs.

H. Thompson, for the Prince of *Mantua*, a director.

Neville, in reply.

(1) 37 Ch. D. 574, 576. (2) 17 Ch. D. 301, 311.
(3) 4 C. P. D. 40.

KEKEWICH, J.:—

I need hardly say that this is a painful case, not perhaps more painful than some others which have come before the Courts, where gentlemen of position and high character have been sued in actions for deceit. It is also a strange case. I certainly never saw such an action as this before, where fifty-four Plaintiffs sue in an action for deceit, and it is an inconvenient and risky mode of proceeding. Twelve of the Plaintiffs have failed to appear, two are dead, and forty have appeared here to sustain the case made by counsel. It is also a strange case in its circumstances. In many cases of this character one has frequently found the statements in the prospectus to be exaggerated. One has found directors taking too sanguine a view of the future, and allowing themselves to take the same sanguine view of the present by reason of that taken of the future, one re-acting upon the other. In other cases one has found concealment which has prevented an adequate appreciation of what was stated; sometimes one has found a careful manipulation of figures and an adroit use of language intended to avoid actual misstatement. There are other varieties including those which contain the plain, unvarnished truth. Here the misstatement relied on is short and simple, and, if construed as I think it must be, it is absolutely untrue. I think it might be more severely characterised without undue severity, but I gladly believe that most of the Defendants wished to avoid deceit. Perhaps they were the victims of someone else—perhaps they were themselves misled; but the language is theirs and they are responsible for it. The words at the head of the prospectus are as follows:—[His Lordship read the clause and continued:—] The company was incorporated on the 1st of November, 1886, and the date of that prospectus is the 30th of November, 1886; and at that date there had only been subscribed a sum of £35, being the seven shares of the seven subscribers to the memorandum of association. Between that date and the 5th of March, 1887, three other subscribers had come in, taking fifty more shares, making in all £285 subscribed out of the £200,000 alleged to have been subscribed. Therefore, if the word "subscribed" means subscribed, as I understand the word, the statement in the prospectus was untrue. But it is said that at that

C. A.
1889
ARNISON
v.
SMITH.
Kekewich, J

date there was a construction contract with the Defendant *Gordon Smith.* I need not comment on that further than to say that in it he agreed to construct the works for £400,000, of which £100,000 was to be paid to him in fully paid-up shares; and although at that time there was no written contract for the purchase of the concession—the written contract being dated the 1st of March, 1887, and registered on the 11th of March, 1887,—yet I take it from the evidence that there was, at any rate, a verbal contract at that time, which was afterwards reduced into writing, for the purchase of the concession for £100,000 to be paid in fully paid-up shares. And the question with regard to the meaning of the word 'subscribed' here is, whether these two sums, or either of them, can be said to have been subscribed. I have been referred to the judgment of Vice-Chancellor *Wood* in *Henderson* v. *Lacon* (1), as having concluded the matter, and that is the only authority in favour of the Defendants. The Vice-Chancellor says (2): "I quite agree that we are not to construe the word 'subscribe' too strictly. It does not necessarily lead us to expect to see a director's name or seal affixed to an instrument, or anything of that kind. I do not say that I should not have been satisfied if I had found that they had *bonâ fide* intended to take shares, along with their acceptance of the office of director; although, regard being had to *Lord Abercorn's Case* (3), and some others, possibly their acceptance of the office of director might not have bound them to take shares. If there had been such *bona fides* at the time of the prospectus being issued—because it was issued immediately upon the formation of the company, and before there could be any time for anything being formally done—I should have been very far from holding that there was any misrepresentation in saying that they had subscribed for these shares." But it must be borne in mind that the Vice-Chancellor was there construing the statement in the prospectus that "the directors and their friends have subscribed a large portion of the capital, and they now offer to the public the remaining shares." It was there considered whether "a large portion" was actually subscribed, and

(1) Law Rep. 5 Eq. 249. (2) Law Rep. 5 Eq. 258.
(3) 10 W. R. 451, 548.

whether the promise to take shares not having taken the form of a distinct application for them, could be construed as a "subscription" for them. The case, therefore, does not give me any assistance, except that in a case of that kind one must not construe the word "subscribed" too strictly. Regarded by itself, I should have thought that there was no doubt about the meaning of the word. If I had not been told that persons of business had a doubt about the matter, I should not have thought it arguable. I should have thought it meant an agreement to take shares by means of a formal application, or otherwise; but, at any rate, an agreement under which there would be a liability to pay. But I do not think I ought to construe it here standing alone. I must look at the context and the surrounding circumstances. I will not inquire what the witnesses thought that it meant. I will construe it simply as it stands. To my mind, the statement at the head of the prospectus says: "To you who are reflecting whether you will apply for debenture stock ranking in priority to share capital, who therefore wish to know what this sum is which is behind you, I say there is £200,000. That sum exists in the only way in which share capital exists. It has been issued to persons who, by subscribing for the same—underwriting it, to borrow a mercantile expression—have rendered themselves liable to pay the amount when required." The language of the *Companies Act*, 1862, is not of much use in construing this phrase; but the provisions of the *Companies Clauses Act*, 1845, are *in pari materiâ*. Under them a certain amount of share capital must be "subscribed" to justify the issue of debentures. Those provisions have been frequently evaded, but I believe they have never been satisfied by a construction contract and payment in shares. There was need here for share capital to be subscribed. The concession had to be paid for, the construction of the works had to be paid for. It was known that money received from the subscribers of shares would have to be applied in this way. The Defendants say that the vendor and the contractor, instead of being thus paid, have accepted shares as an equivalent. I think there is all the difference in the world between the two modes of payment. There may be more reasons than three, but I will give three. The first is, as one of the witnesses stated, that contractors accept

C. A.
1889
ARNISON
v.
SMITH.
Kekewich, J.

less in cash than in shares; the second is, that cash is a guarantee that the works will be proceeded with; and the third is, that a subscription of two-thirds of the whole share capital indicates confidence in the investing public, which justifies confidence in others. I have no doubt whatever that the statement in the prospectus was material. With only one exception, all the Plaintiffs who have appeared have sworn that they relied on it; some construed it differently from others, yet substantially all said: "We have a general notion that debenture stock is a charge on the property, and the value of the charge depends upon the value of the property, which again depends upon the money put into the property." No one can deny the principle of that. Is it not just what one might assume without evidence? Again, some of the witnesses said: "We thought this £200,000 was put, or ready to be put, into the property." I hold that the statement, therefore, in the prospectus was not technically true, and, in fact, had no substance of truth about it. Judged by the reasons I have above mentioned, it was distinctly untrue. I do not consider it capable of any reasonable meaning substantially different from that I have given to it. The case falls within the rule I laid down in *Capel* v. *Sims' Ships Composition Company* (1). The passage to which I refer is this: "A plaintiff in an action of this kind was entitled to succeed if he could put his hand upon a positive and material untruth—that is, an untrue statement expressed in reasonably plain language, of such a character that, in the absence of evidence to the contrary, it must be taken to have influenced the contract in the sense of having induced the plaintiff to do that in belief of what was false, which, if he had known the truth, he would have refrained from doing." When that has been corrected by the Court of Appeal, I will gladly follow it: but until that is done I shall follow my own decision. That, to my mind, is clearly in accord with *Peek* v. *Derry* (2), where *Cotton*, L.J., says (3): "What, in my opinion, is a correct statement of the law is this—that where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or

(1) 58 L. T. (N.S.) 807, 808. (2) 37 Ch. D. 541.
(3) 37 Ch. D. 566.

without care whether it is true or false—that is, without any reasonable ground for believing it to be true—he is liable in an action of deceit at the suit of any one to whom it was addressed and who was materially induced by the misstatement to do an act to his prejudice." Mr. *Alexander* says that the statement in this prospectus was not made recklessly, or without reasonable care whether it was true or false, because it was made after due consideration and under legal advice. But one must read in conjunction with that another passage from the judgment of Lord Justice *Cotton*, where he says (1): "I think the plaintiff has a right to insist that the defendants are liable for the ordinary meaning of the words used, because, however much people in their own minds may mean to qualify their statements, if a man makes a statement which, according to its ordinary meaning, bears a particular construction, he, in my opinion, is liable to those who, reading it and construing it reasonably, do put upon it the primary meaning and the fair construction of the words used." That, to my mind, covers this case exactly, and is the doctrine of *Smith* v. *Chadwick* (2). It has been urged that the different Plaintiffs have put a different construction upon these words. There is no doubt they did. Some thought "subscribed" meant "subscribed and paid," and that the money was in the coffers of the company, some that it meant subscribed by the public or subscribed generally. But if I am right, I think their different constructions of it are not of such a substantial difference as to be of any moment, and that they all understood it in the sense in which I have construed it. As regards the defences to the action, there has been really only one. The Defendants say: "This was not the only inducement. The prospectus set forth other good reasons for inducing people to subscribe, and the Plaintiffs were moved by these reasons." No doubt they were to some extent. Some relied upon the names of the directors and of the trustees for the debenture holders; some had a large notion about waterworks generally; and others happened to know *Genoa*, or were attracted by the description of it in the prospectus. One Plaintiff noticed that the contract had been entered into with a well-known firm.

(1) 37 Ch. D. 571. (2) 9 App. Cas. 187.

C. A.
1889
ARNISON
v.
SMITH.
Kekewich, J.

Many thought it was a good thing, and one was struck by the intention to apply for a quotation upon the *Stock Exchange*. It is not possible to analyse the different motives which actuated the applicants for this stock. In *Peek* v. *Derry*, Lord Justice *Cotton* says (1): "It is quite sufficient if the statement is a material inducement to the party to act upon it." The whole passage in which this sentence occurs is an exposition of the answer to be made to this defence, shewing that, as long as the statement in the prospectus was a material inducement, the other motives which may also have induced the parties to make applications are of no value. This is really the only defence to the charge as to the misstatement in the prospectus. The main answer to the Plaintiffs is outside the prospectus. It seems that one of the trustees objected to the statement, and so it was determined to correct it. Nothing could have been easier than to have stated: "What we said was subscribed, was not. Mr. *G. Smith*, promoter, vendor, and contractor, has agreed to accept payment in shares to the extent of £200,000. That is all. You have paid your money under a mistake, and you can have it back." That would have been as straightforward as easy, and would have avoided all possibility of claim. It would also have denuded the company of money. That would not have suited Mr. *G. Smith*, and, I add with reluctance and regret, it would not have suited the directors. The money that had been subscribed for debenture stock was the only money the company had. Out of that Mr. *G. Smith* was to receive some part of the gain for which he had stipulated; out of that also had to be paid the remuneration of the directors and their qualification for office. Something short of this was therefore done. It was attempted to tell the subscribers sufficient to prevent their ever saying that they had not been warned, yet to avoid alarm as far as possible, and to avoid any offer to return the money. A phrase was employed which has the merit of novelty. The share capital was said to be "appropriated." Call any man of intelligence and ask him whether shares not yet issued, shares never intended to be issued except in payment for work or material, can properly be said to be appropriated? But without doubt the third paragraph

(1) 37 Ch. D. 574.

of the circular of the 17th of December, read as a whole, was an intimation that the prospectus was incorrect, and to a reader of ordinary care and intelligence that it was incorrect in this material particular—that the shares were not subscribed. Most of the Plaintiffs who have been examined so understood it, and I am disposed to hold that those who did not ought to have done so. Some, it seems, had the energy to reclaim their money, and it was returned to them. Others had less faith in the honesty or solvency of promoters and directors, and were content rather to lose what they had invested than to embark in correspondence and litigation. The Plaintiffs are in this class. And it is said that for this reason, and because they did not commence an action for nearly twelve months, and because in the meantime they received interest paid out of their own moneys, they elected to stand by their bargain and have lost their remedy, and have deceived those who deceived them. It is not necessary to decide whether they could have rescinded. I asked for authority that what constitutes election to defeat a claim for rescission against a contracting party must defeat a claim against a person whose misrepresentation induced the contract. None was forthcoming, but my attention was called to another passage in *Peek* v. *Derry*, where Lord Justice *Cotton* says (1), in reference to the conduct of the plaintiff in that case: "It is a question as to whether he has precluded himself from bringing this action against the directors. He has not precluded himself, but his conduct there I think was fairly used as an argument that it would shew that he had not considered himself in any way deceived." I think the argument urged before me here was also fairly used for that purpose. As regards most of the Plaintiffs, they paid their money in full, nothing more remained to be done, and there was no offer to return the money. They did receive interest, and although that is a fact not to be forgotten, yet, even if sufficient as against rescission, it is not enough here, remembering that interest was not paid by the parties sued. Some of the Plaintiffs had not paid in full, and did not receive discount, and are in a somewhat different position; but there is not enough to preclude the action for deceit, though it would be cogent as regards

(1) 37 Ch. D. 576.

C. A.
1889
ARNISON
v.
SMITH.
Kekewich, J.

an action for rescission. That is the whole case. But some objection has been taken to the way in which the action was got up. It seems that a gentleman of the name of *Ghighliotti* made some statement which the directors answered, and upon this coming to the knowledge of the debenture-holders, some of them consulted Mr. *Kimber*. The result was that a meeting was convened, a committee appointed, and an agreement was come to that the directors should be sued. This, of course, is not the highest class of business in which a solicitor can be engaged; but it is of great public advantage that a tempting prospectus which contains untrue statements, and thereby not merely deceives investors, but robs men and women, not well instructed in such matters, of savings which they can ill afford to lose, should be exposed in open Court; and I am not inclined to find fault with the activity which has produced that result. The plan of combining many Plaintiffs was risky; it has to some extent failed; but this substitute for many actions has at least the merit of saving costs, and, whoever else may complain of it, the Defendants cannot. So far I have treated all the Plaintiffs as on an equal footing, but some distinctions have to be drawn. As regards those who appeared as witnesses, there is, to my mind, no substantial difference. *Mary Ann Clewes*, a married woman, acted less than others on her own conclusions, and was, in fact, advised and guided by her husband; but the prospectus was received by her, she was influenced by that, and, this being proved, the case falls within the rule laid down by Lord *Blackburn* in *Smith* v. *Chadwick* (1). I am referring to the passage at p. 196 quoted by Mr. *Neville* in his opening. There are twelve Plaintiffs who have not personally appeared at the trial, and there is Mr. *Merck*, who, at his own request was not examined, although called and sworn. These are all admitted to have been applicants for debenture-stock and to hold it. I should not hesitate to follow Lord *Blackburn's* ruling in *Smith* v. *Chadwick*, and to give judgment for a plaintiff not called as a witness, if deceit was otherwise proved, remembering, of course, the caution which he gives at page 196 that "the tribunal which has to decide the fact should remember that now, and for some years

(1) 9 App. Cas. 187.

past, the plaintiff can be called as a witness on his own behalf, and that if he is not so called, or being so called does not swear that he was induced, it adds much weight to the doubts whether the inference was a true one." But here deceit depends upon proof that the parties were influenced by the prospectus, and though it is extremely probable that these other Plaintiffs received prospectuses, and were misled by them, that cannot be inferred. It is quite possible that they did not, and were otherwise influenced. They have not thought it right to come here and to support their case, and as regards these Plaintiffs there will be judgment for the Defendants with costs. As regards the Plaintiffs who have appeared, including *Joseph Smith* as represented by his brother, and Mrs. *Day*, as represented by her husband, there will be judgment for damages, and they must have their costs of action. I was disposed to except the costs so far as they have been increased by the addition as Plaintiffs of those as against whom judgment has been given for the Defendants; but it is safer to follow *Viscount Gort* v. *Rowney* (1), which was fully discussed, though perhaps in more than one respect distinguishable, and to give the Plaintiffs their costs of action, as if they were the only Plaintiffs. The only thing remaining to be disposed of is the question of damages. I would gladly have acceded to the request of the Plaintiffs that I should at once assess the damages. I know by experience that by so doing further litigation and increased costs may be avoided, but, at the same time, I am bound not to assess damages unless I can do so adequately and to my own satisfaction. The principle of the assessment is perfectly clear, and again I have a guide in *Peek* v. *Derry* (2). The question as to damages was there separately argued, and it was laid down that the damages to be recovered was the difference between the price paid for the shares and their actual value at the time of such payment. What Lord Justice *Cotton* says upon that point is this (3): "The real value, and not the market value, is to be ascertained immediately after the day when the shares were allotted to the plaintiff." I cannot say what the real value was of this thing which the Plaintiffs purchased. They

(1) 17 Q. B. D. 625. (2) 37 Ch. D. 541.
(3) 37 Ch. D. 592.

C. A.
1889
ARNISON
v.
SMITH.
Kekewich, J.

were to have "a first charge upon the entire assets and property of the company, and the concession granted by His Majesty the King of *Italy*." I am not at all prepared to accept the evidence given as to its value, but I do think that there was something valuable, and the question to be solved is this: "What was the value then or what was the stock actually worth then, as compared with the value it would have had, if the £200,000 had been actually subscribed as stated?" But the real question which I will refer to Chambers is: "What is the difference between the price paid and the actual value of the thing purchased at the the date of the prospectus?" Mr. *Warmington*, on behalf of the Defendants who were directors, conceded that the actual value might properly be ascertained at the date of the receipt of the circular of the 17th of December, when, he says, the Plaintiffs were informed of the real position of affairs. I cannot accept his concession. What its practical effect would be here I cannot tell, but it is not sound. The injury is occasioned by the deceit, and, though subsequent circumstances may have to be investigated in order that the full extent of that injury may be disclosed and calculated, still the date of the deceit is that on which the damages intended to be equivalent to the injury must be estimated. I have endeavoured to decide legal questions only and to avoid any remarks on the moral conduct of parties. I should not have said the little I have if I had not been asked to place the directors on a higher platform than that on which they really stand.

H. L. F.

The judgment was that the forty Plaintiffs who had proved their cases should recover against the Defendants the damages which should be ascertained by the inquiry thereinafter directed in respect of deceit and misrepresentation in the prospectus and their costs of the action. An inquiry as to the damages sustained by the forty Plaintiffs was directed in the form in *Peek* v. *Derry* (1), and it was ordered that the Defendants should recover against the twelve remaining Plaintiffs their costs occasioned by the last-mentioned Plaintiffs being joined as Plaintiffs.

(1) 37 Ch. D. 590

The Defendants appealed against this judgment so far as it gave relief to the forty successful Plaintiffs. The twelve Plaintiffs who had not attended at the hearing appealed against so much of the judgment as related to them.

The appeals were heard on the 10th and 12th of April, 1889.

Rigby, Q.C., and *Farwell*, for the Defendants, in support of their appeal:—

It is established that each of the forty Plaintiffs received the prospectus, and they all gave evidence that they relied upon it. The language of some of them might be commented upon if it stood alone, but, taking them all together, and having regard to the conclusion of fact come to by Mr. Justice *Kekewich*, who saw and heard them, we cannot dispute that they took their stock in reliance on the prospectus. Assuming, however, that the prospectus contains a misrepresentation, the statement made must in order to support an action of deceit not only be untrue, but also be either untrue to the knowledge of the person who makes it, or be made recklessly without caring whether it was true or false. Here the prospectus was drawn up deliberately and with legal advice, and the directors believed it to be true.

[LORD HALSBURY, L.C.:—My view is that the directors made a deliberate attempt to go as near to a falsehood as they could do without making a statement so untrue that they could be held liable upon it.]

If they *bonâ fide* thought that "subscribed" did not express an untruth there is an absence of the *mala mens* which is necessary to support an action of deceit.

But supposing the Plaintiffs to have been deceived, the circular gave them a correct account of the state of things. Those of them who had paid up in full on allotment received discount, those who had not paid up in full went on and ultimately paid up in full. None of them complained to the company or asked to have their money back. They must therefore be treated as resolving to go on with a knowledge of the real facts. At all events, those who went on paying money after they knew the facts cannot have damages in respect of the moneys subsequently

C. A.
1889
ARNISON
v.
SMITH.

paid, for they paid them with their eyes open. The loss was not suffered till the Plaintiffs accepted the debenture stock, which was after the issue of the circular.

[LINDLEY, L.J.:—Is not the loss sustained as soon as the money is gone?]

No, not till the stock is accepted which completes the contract, the first agreement is then merged in the second: *Leggott* v. *Barrett* (1). The damage arises not from entering into the contract, but from completing it.

[LORD HALSBURY, L.C.:—Does no damage arise when the money is paid?]

No, there is no loss till the debenture-holder gets a debenture which is not so good as what he bargained for. There is no case in the books in which an action for deceit has been successful where the plaintiff knew the real state of things before completion. Up to completion the party would have two remedies, an action to rescind, or an action for deceit inducing him to enter into the contract: after completion there can be no remedy but an action for deceit inducing him to complete. The information given by the circular was sufficient, a person cannot be heard to say that he understood a sentence of plain English in an impossible sense: *Reynell* v. *Sprye* (2), and the passage from the Digest there cited. If an inquiry as to damages is directed at all it should be as to damages sustained at the time of the acceptance of the stock.

Neville, Q.C., and *Oswald*, for the Plaintiffs, were desired to confine themselves to the cases of those Plaintiffs who had not paid up in full on allotment:—

We say there is no distinction in law between those who paid up in full before the circular and those who did not. The damage cannot be referred to the time of accepting the stock.

[LORD HALSBURY, L.C.:—We do not think that it can. The question is only as to the amount of damages. Were you at liberty to go increasing the amount of damages by paying money after you knew of the misstatement?]

(1) 15 Ch. D. 306, 309. (2) 1 D. M. & G. 660, 687.

A person misled by fraudulent misrepresentation has his option to rescind or to affirm the contract and sue for damages. We elected to affirm, and then we were under an obligation to pay up the instalments, the payments were not voluntary. The proposition we put is stated in *Kerr* on Fraud (1). The order made follows *Peek* v. *Derry* (2).

[COTTON, L.J.:—There the plaintiff had precluded himself from rescinding before he knew of the fraud.]

The cases shew that an action to rescind and an action for deceit are perfectly independent, and there is not a trace of authority in support of the position that you must resort to the former before resorting to the latter. A fraudulent man cannot have a right to say to the person whom he has defrauded, "You have paid £100 and are liable to pay £900 more under a contract into which my fraud induced you to enter. Do not pay any more but proceed to rescind." It would be shewing undue favour to fraud to hold people defrauded to be debarred from their remedies unless they take them in a particular order.

Theodore Dodd, for the representatives of two Plaintiffs who had died since the judgment.

Rigby, in reply.

LORD HALSBURY, L.C.:—

I am of opinion that this appeal must be dismissed. The action is one in which the Plaintiffs complain that they have been deceived by the Defendants, and have by reason of that deceit lost certain sums of money, and so sustained damage. In an action of this character, speaking for myself, I adopt the language of *Earl Selborne* in *Smith* v. *Chadwick* (3): "I conceive that in an action of deceit, like the present, it is the duty of the plaintiff to establish two things; first, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making

(1) 2nd Ed. p. 383. (2) 37 Ch. D. 541.
(3) 9 App. Cas. 187, 190.

C. A.
1889
ARNISON
v.
SMITH
Lord Halsbury, L.C.

them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts: and, secondly, he must establish that this fraud was an inducing cause to the contract; for which purpose it must be material, and it must have produced in his mind an erroneous belief, influencing his conduct." I am of opinion that in the present case the existence of all these elements is established, and, speaking for myself, I cannot concur with some of the language of Mr. Justice *Kekewich*, as I cannot reconcile a deliberate statement of what is untrue with an intention to avoid deceit. If men make a statement which is intended to be believed, and which when when they make it they know to be untrue, I cannot agree that they may have no intention to deceive. Mr. Justice *Kekewich* speaks of the Defendants as having been "misled:" if that means tempted to go in a wrong way, I agree, but if it means deceived by others, I think the decision ought to have been in favour of the Defendants. A deliberate statement was made, and the Defendants cannot be heard to say that they did not know the popular meaning of the words they used. If they had said "We did not know what was in the prospectus, and hastily put our names to it without reading it," the case would be open to different considerations, but the fact is that they discussed the terms of the prospectus, took advice upon it, and every one of them must have known that the statement was, taking its words in their ordinary sense, untrue. I think, therefore, that they were guilty of fraud. I am unwilling to use language which causes unnecessary pain, but I cannot help thinking that confusion has been introduced into the law by the reluctance to give conduct its proper name, and in many cases mild terms have been used before a jury in order to coax them into a verdict which they might be averse from giving if a stronger and more correct term were used. If men tell for business purposes what in plain English is called a lie, they are guilty of fraud, and to talk about their having had no intention to deceive is no more a defence than it would be a defence to a prosecution for forging a bill of exchange to say that the forger meant to pay it when it became due. In my judgment, then, the Plaintiffs have established the first requisite—actual fraud.

The second requisite is that the fraud was an inducing cause to the contract. It is an old expedient, and seldom successful, to cross-examine a person who has read a prospectus, and ask him as to each particular statement what influence it had on his mind, and how far it determined him to enter into the contract. This is quite fallacious, it assumes that a person who reads a prospectus and determines to take shares on the faith of it can appropriate among the different parts of it the effect produced by the whole. This can rarely be done even at the time, and for a shareholder thus to analyse his mental impressions after an interval of several years, so as to say which representation in particular induced him to take shares, is a thing all but impossible. A person reading the prospectus looks at it as a whole, he thinks the undertaking is a fine commercial speculation, he sees good names attached to it, he observes other points which he thinks favourable, and on the whole he forms his conclusion. You cannot weigh the elements by ounces. It was said, and I think justly, by Sir *G. Jessel* in *Smith* v. *Chadwick* (1), that if the Court sees on the face of the statement that it is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, or that it would be a part of the inducement to enter into the contract, the inference is, if he entered into the contract, that he acted on the inducement so held out, unless it is shewn that he knew the facts, or that he avowedly did not rely on the statement whether he knew the facts or not. I think, therefore, that the second proposition is proved—that the Plaintiffs were induced to take stock by the misrepresentation.

I have so far dealt only with the prospectus, but we have also to deal with the correction by the circular. It has been contended that the misrepresentation in the prospectus was undone by a clear and correct explanation in the circular. I do not wish to commit myself to a concluded opinion upon anything which does not arise in the present case. If the directors had sent to each of the Plaintiffs a notice to this effect, "We have deceived you and, if you like, you can have your money back," the case would have stood very differently, and I reserve my opinion as to what

(1) 20 Ch. D. 27, 44.

C. A.
1889
ARNISON
v.
SMITH.
Lord Halsbury, L.C.

would then have been the right course for the Court to take. It may be that in such a case it would be held not reasonable for the plaintiffs to go on with their eyes open and incur further damage. It is needless to give any opinion on that, because in my opinion that state of things does not exist. I do not agree that the circular put any one in the position of knowing the true facts of the case. Before referring to the document I will observe that assuming a fraud to have been committed it obviously lies on those who rely on a subsequent explanation to shew that such explanation was quite clear. If the directors had repented of what they had done, and had been desirous of making reparation, they would have called the attention of the Plaintiffs to the fact that there was a serious error in the prospectus. I will illustrate what I am saying by stating the effect on my own mind. I did not at first see the whole circular, but only an extract from it. "The £200,000 share capital mentioned in the prospectus as having already been subscribed is an amount which has been appropriated to the contractors to be issued to them as fully paid up shares in payment for the concession, and in part payment of the contract price for the construction and completion of the works, and maintenance of the same for twelve months after." This appeared to me to be a clear statement of the truth. But look at the circular as a whole; this statement does not come till the latter part of the third paragraph. No admission of mistake is made, but the information is given, so to say, incidentally in the midst of a number of other matters. I am not surprised at the difference of the views taken of it by the Plaintiffs who have given evidence, hardly any two agreed as to what they understood it to mean. Is that the way in which the effect of a fraudulent misstatement is to be got rid of? The prospectus appears to me to have been drawn up with the aim of conveying a wrong impression under words sufficiently near the truth to escape being treated as a misrepresentation, and I think that the circular was framed with a similar view, to avoid bringing to the minds of the Plaintiffs the real facts of the case while stating enough to enable the Defendants to say that the Plaintiffs were informed of those facts. I think, therefore, that the circular does not alter the case, and that the appeal must be dismissed.

COTTON, L.J.:—

I have come to the same conclusion, but on somewhat different grounds. I do not think that in order to enable the Plaintiffs to obtain a decree it is necessary to shew that fraud was intended. When a person makes a statement to others with a view to their acting upon it, he is bound to see to its truth, and if it is untrue it is not necessary to shew that he intended to deceive. I have already expressed my view to that effect in *Peek* v. *Derry* (1), and in *Smith* v. *Chadwick* (2) Sir *G. Jessel* said: "Without repeating at full length what I have said in a recent case, I think the law on this subject is clear. A man may issue a prospectus, or make any other statement to induce another to enter into a contract, believing that his statement is true, and not intending to deceive; but he may through carelessness have made statements which are not true, and which he ought to have known were not true, and if he does so he is liable in an action for deceit; he cannot be allowed to escape merely because he had good intentions and did not intend to defraud." If a man makes statements to another person with a view to their being acted on he undertakes the duty of seeing that his statements are correct, and is liable if he does not take due care to see that they are correct. Mr. Justice *Kekewich* thought that these gentlemen considered that they might make this statement without fraud, but the statement, taking its words in their ordinary meaning, was untrue, and, therefore, though I do not see the inconsistency which the Lord Chancellor finds between the language of Mr. Justice *Kekewich* and the conclusions at which he arrived, I agree in thinking the Defendants liable, for they knew the real state of facts and used language which, as they must be taken to have known, would convey a false impression.

Then as to the circular, I quite agree with the Lord Chancellor, and hardly think it necessary to add anything to what he has said. It was contended that going on after receiving the circular was an affirmance of the contract, with knowledge of the real facts, and that such affirmance is inconsistent with this action. But a man may affirm a contract and yet sue the person who by fraud induced him to enter into it. Mr. *Rigby* admitted this, but

(1) 37 Ch. D. 541. (2) 20 Ch. D. 27, 44.

C. A.
1889.
ARNISON
v.
SMITH.
Cotton, L.J.

contended that the Plaintiffs could not recover damages for the loss of the money which they advanced after they knew the facts. Like the Lord Chancellor, I reserve my opinion as to what ought to be done in such a case as that supposed by him, a case where the persons who had made the representation admitted the misrepresentation and offered to refund the money paid. I leave the question open whether, in such a case, the parties defrauded could aggravate the damages by going on and making further advances. The Defendants are not in that position. The passage in the circular is merely introduced as an explanation, not admitting any misrepresentation, and not informing the parties that they were at liberty to retire and have their money back again; and I think that this does not do away with the effect of the previous misrepresentation.

LINDLEY, L.J.:—

I am of the same opinion. Whether the directors in the high moral point of view were guilty of fraud, I do not say, but the facts of the case leave in my mind no doubt of their legal liability. They made a statement which was untrue, and which they knew to be untrue, and whatever were their motives they are liable. The case is not like one where the persons making the representation have not full knowledge of the facts. The directors here knew the real state of things, and thought that "subscribed" was a proper word for them to put into the prospectus; they flattered themselves that they had found a word which was near enough to the truth not to be treated as a misrepresentation; but it was not the right word for informing the public that these shares had been appropriated as fully paid-up shares to the contractors. I do not think that the judgment of Sir *G. Jessel* in *Smith* v. *Chadwick* (1) is inconsistent with the law as laid down by Earl *Selborne* in the same case (2), for Earl *Selborne* says that in considering whether there has been actual fraud reference must be had to the intention which the law imputes to every one to produce those consequences which are the natural result of his acts, and if a man uses language which taken in its natural sense

(1) 20 Ch. D. 27. (2) 9 App. Cas. 190.

conveys a wrong impression, he cannot be heard to say that he did not intend to deceive.

The statement, then, being untrue, and known to be untrue, an action for damages lies.

The Plaintiffs fall into two classes. One class paid up in full on allotment. What was their position? They had parted with their money. It is said that they would have had it back again if they had asked for it; but I am not clear that they would. Having been induced to part with it by misrepresentation they had a right of action and I cannot see that they have ever lost it.

The other class paid £20 per cent. before they received the circular, and paid up the rest afterwards. If the circular had stated that there had been a misrepresentation in the prospectus and that those allottees who wished could have their money back, I think the directors would have gone a long way towards doing away with the effect of the misrepresentation. I am not, however, prepared to decide what would have been the effect of such a circular, for the facts do not raise the question. The issuing the circular was not the voluntary act of the directors, it was forced upon them by an honest trustee for the debenture stockholders. It does not distinctly point out that there had been a misrepresentation in the prospectus, and it contains no offer to refund. I do not say that it does not make it clear to the mind of a lawyer what the misrepresentation was, but it was not calculated to make plain business people understand that there had been a misrepresentation entitling them to a return of their money, and it does not appear that any one of them understood that he could have his money back. I think, therefore, that this class of Claimants were justified in paying up the remaining £80 per cent. and then claiming damages.

The appeal of the twelve Plaintiffs who were absent at the hearing was then opened.

Neville, Q.C., and *Oswald*, for the Appellants:—

We contend that judgment ought to have been given in our favour. The letters of application for stock which are produced,

C. A.
1889
ARNISON
v.
SMITH.

refer to the prospectus; it is to be inferred from this that these Plaintiffs saw the prospectus, and it is also to be inferred that they acted on the faith of the representations in it. That they should give evidence of this is not essential: *Smith* v. *Chadwick* (1).

[LORD HALSBURY, L.C.:—It certainly is in the highest degree improbable that these Plaintiffs did not see the prospectus, or that they were not influenced by the representation contained in it; but we are all of opinion that there is no evidence of those facts upon which a Court of Justice can act.]

Then we say that the judgment ought to be varied as to us, by making it equivalent to a nonsuit, so that we may bring fresh actions.

Rigby, Q.C., and *Farwell*, for the Defendants:—

These Plaintiffs should have taken proper steps to have the trial adjourned. They went on and must take the consequences.

LORD HALSBURY, L.C.:—

We are all of opinion that, under the circumstances in which these Plaintiffs were absent, the judgment as against them should be varied by making it without prejudice to a fresh action.

Solicitors: *Kimber; Burn & Berridge; Seeley & Son.*

(1) 9 App. Cas. 187, 196.

H. C. J.

CARDIGAN *v.* CURZON-HOWE.

C. A.
1889
April 12, 13.

[1869 C. 30.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-s.* (*x*)—*Sale by Tenant for Life—Costs of obtaining Consent of Mortgagees of Life Estate.*

On a sale by a tenant for life under the *Settled Land Act*, 1882, the costs of obtaining the consent and concurrence of mortgagees of the life estate, although they are costs incidental to the exercise of the statutory power of sale, ought not as a general rule to be paid out of capital money produced by the sale, though there may be special cases in which they can properly be so paid.

Decision of *Chitty*, J., affirmed.

THIS was an appeal from a decision of Mr. Justice *Chitty* (1).

The Countess of *Cardigan* was equitable tenant for life under the will of the late Lord *Cardigan*, who died in 1868. In 1869 she obtained a decree for administration of the trusts of the will, and the proceedings under it had not been closed. After the passing of the *Settled Land Act*, she, as tenant for life, entered into agreements for sale of parts of the estates. Mr. Justice *Chitty* decided (2) that she had power to sell without the sanction of the Court, but that the purchase-money must come into Court to the credit of the action. Lady *Cardigan* had made a series of mortgages of her life estate, and the conduct of the action had been given to the first mortgagees. The purchasers had required the consent and concurrence of the mortgagees, and this had been obtained. The question then arose whether the costs of obtaining such consent and concurrence ought to be allowed out of the purchase-money under sect 21, sub-sect. (x.) Mr. Justice *Chitty* held that they were not costs "of or incidental to the exercise" of the powers of the Act, and were not to be allowed. The Countess appealed, and the appeal was heard on the 12th and 13th of April, 1889.

Byrne, Q.C., and *Fossett Lock*, for the Appellant:—

Sect. 3, sub-sect. 1, gives the tenant for life power to sell.

(1) 40 Ch. D. 338. (2) 30 Ch. D. 531.

C. A.
1889
CARDIGAN
v.
CURZON-HOWE.

Sect. 50, sub-sect. 1, makes this power continue notwithstanding alienation of the life estate; but by sub-sect. 3 the rights of the alienee are not to be affected without his consent. Sect. 53 places the tenant for life in the position of a trustee when exercising the statutory powers. Sect. 21, sub-sect. (x.), mentions, among the purposes to which the moneys arising from the sale may be applied, the payment of costs, charges, or expenses of or incidental to the exercise of any of the powers or the execution of any of the provisions of the Act. The question, then, is, whether these costs are not costs incidental to the exercise of the statutory powers. *In re Beck* (1) is a case in point; the question was distinctly raised, and it was held that the costs must be allowed.

[COTTON, L.J.:—I do not see anything in the Act which provides that they must be allowed, where the Court thinks that the tenant for life ought to bear them.]

The Act intends the tenant for life to have the same powers and advantages as a trustee for sale, and by rule 15 of the rules of December, 1882, made under the Act, he is entitled to his costs. Now suppose the sale was made by trustees under a power in the will, the alienation would not take away the power of the tenant for life to consent: *Alexander* v. *Mills* (2); *In re Cooper* (3). But the purchaser would be entitled to require the concurrence of the alienee. The sale could not be carried into effect without it, and the trustee must be allowed the costs of obtaining it as part of the expenses properly incurred in effectuating the sale. *Hardaker* v. *Moorhouse* (4) appears at first sight to countenance the view that the concurrence of the alienee is not necessary; but there is a broad distinction between the exercise of a power of appointing new trustees and the exercise of a power which takes the appointed property out of the settlement. *In re Sebright's Settled Estates* (5) has some bearing on the present case.

[LORD HALSBURY, L.C.:—I cannot understand the remarks

(1) 24 Ch. D. 608.
(2) Law Rep. 6 Ch. 124.
(3) 27 Ch. D. 565.
(4) 26 Ch. D. 417.
(5) 33 Ch. D. 429, 440.

of the learned Judge as to the tenant for life selling the reversion.]

It is a disputed point among conveyancers whether the sale can be made subject to the incumbrances on the life estate.

[LORD HALSBURY, L.C.:—Do you say that the Act gives you these costs, or do you appeal to our discretion?]

We say that the Act gives them as to a trustee, subject to the power of the Court to take them away on due cause shewn, and no misconduct is here alleged which would be a ground for taking them away.

Romer, Q.C., and *Nalder*, for the tenant in tail, were not called upon.

LORD HALSBURY, L.C.:—

I am of opinion that this appeal must be dismissed. The construction of the statute is, of course, a most important question, and for my own part I am not able to follow the reasoning by which Mr. Justice *Chitty* supports his decision. It seems to proceed upon a construction of the statute to which I do not at present assent. The learned Judge appears to say that the whole question turns upon the 21st section, which speaks of costs "of or incidental to the exercise of any of the powers" of the Act. He then proceeds to say that the mortgagee is at liberty either to assent or to dissent from the arrangement proposed, and that under those circumstances it cannot be said that the consent of a mortgagee is under the powers of the Act. In a certain sense that is quite true. But what I think the learned Judge has not sufficiently observed is, that the thing done under the powers of the Act is the sale; and if for the purposes of the sale, and the most beneficial exercise of the power of sale, it is necessary to get the consent of the mortgagees, it seems to me a straining of language to say that the costs of obtaining such consent are not costs incidental to the exercise of the power of sale, which is a power given only by the Act. I am not therefore able to concur in the ground of the judgment which the learned Judge has arrived at. But I think it equally clear that you cannot lay

C. A.
1889
CARDIGAN
v.
CURZON-HOWE.
Lord Halsbury, L.C.

down as a broad proposition that every tenant for life is at liberty to create incumbrances in his character of beneficial owner, and then in his character of trustee to say, "I must get the best price I can for this property; for that purpose I must get in these incumbrances, and therefore in my character of trustee I claim to be indemnified against the costs, charges, and expenses incurred in getting them in." It seems to me that such a proposition would be unreasonable. I think the question in each case must be whether costs incurred by the tenant for life are such that they can be held to be properly and reasonably incurred for the purpose of the exercise of the power.

I observe that Mr. Justice *Chitty*, contemplating, apparently, the possibility that this Court might take a different view of the construction of the statute, and might hold it to be a question for the discretion of the Court in each case, says, "If it is a matter of discretion, then I certainly exercise my discretion adversely to this claim." It appears to me that Mr. Justice *Chitty* exercised his discretion very soundly in refusing to allow these costs.

COTTON, L.J.:—

I agree. It was put, as I understand, in the Court below, that under the 21st section the Court was bound to apply capital moneys in the discharge of these costs and expenses, but that is not so. Sect. 21 only says that the capital moneys "shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes," that is to say, it is to be invested for the purpose of keeping it for the benefit of those entitled to the settled estate, unless it is applied for one or other of the purposes for which it is authorized, not ordered, to be applied. There is no direction that it shall be applied for every one of these purposes, it is authorized, not ordered, to be applied for any of them, and unless so applied it must be invested.

Then, as regards sect. 21, sub-sect. (x.), I agree with the Lord Chancellor in saying that I cannot quite follow the reasoning of Mr. Justice *Chitty*, because, in my opinion, although these are not costs, charges, and expenses of the exercise of the powers of the

Act, for the obtaining the consent of the mortgagees was not an exercise of any such power, yet they are costs incidental to the exercise of the power of sale given to the tenant for life by the Act. But ought these costs, therefore, to be allowed to the tenant for life when selling? It was said that sect. 53 puts the tenant for life, in relation to the exercise of the power of sale, in the position of a trustee. That is true to a certain extent, but she is in that position only as regards being subject to the duties and liabilities of a trustee for the persons to whose interests she is to have regard in the sale. Here the tenant for life by her own act has made necessary the concurrence of these parties. In my opinion, even taking this 53rd section as putting her in the position of a trustee more fully than I consider it to do, she ought not to be allowed costs and expenses which are caused by her having previously, with a view to her own benefit, and for a purpose entirely independent of her character of trustee, called into existence an interest vested in a person whose concurrence she must obtain when she exercises her power as trustee. Here, when the tenant for life mortgaged it was not for any purpose connected with the estate or for the benefit of those entitled in remainder, but simply for her own purposes, and though the getting the concurrence of these mortgagees is done by her in exercising the power, yet she only does it because by her previous act, in no way done by her as a trustee, she has rendered it necessary to obtain this concurrence when so exercising the power. In my opinion as a general rule a tenant for life exercising the powers of the Act ought not to be allowed the costs, charges, and expenses of obtaining the concurrence of her mortgagees, when she has made those mortgages simply for her own purposes and for her own benefit. There might be cases where mortgages of the life estate were made not simply and solely for the benefit of the tenant for life, but also for the benefit of the estate, and then it might be quite right for the Court to say that the costs of obtaining the concurrence of the mortgagees in a sale should be allowed out of the capital. I do not say that such a case could very easily arise, but it might possibly arise, and it would be within the power of the Court in such a case to give those costs out of the capital. But in the present case I see

C. A.
1889
CARDIGAN
v
CURZON-HOWE
Cotton, L.J.

no reason for differing from the view taken by Mr. Justice *Chitty* that as a matter of discretion he should not allow these costs. As a general rule, in my opinion, costs of obtaining, on a sale under the Act, the concurrence of mortgagees of the life estate, ought not to be allowed out of capital, and that will be a rule for trustees to act upon when the capital money is not in Court, and they have to deal with it.

LINDLEY, L.J.:—

I am of the same opinion. I entirely concur in the passage which I am going to read from the judgment of Mr. Justice *Chitty* (1): "Looking at this Act of Parliament as a whole, and having carefully analysed its provisions, I have come to the conclusion that the Legislature never meant to throw upon the inheritance—that is, the capital money produced by the sales—such a burthen as this, which has arisen, and may in many other cases arise, simply through the extravagance of the tenant for life." I am not prepared to go the length of saying that the costs incurred by the tenant for life of obtaining the concurrence of mortgagees, even where the mortgages have been created by the tenant for life, can never be properly allowed out of capital. It appears to me there may be cases in which they might properly be so allowed. On the other hand I think it is quite obvious that there are cases, and this, in my opinion, is one of them, in which it would be improper to throw those costs on the capital. The true practical working rule is, as put by Lord Justice *Cotton*, that *primâ facie* the tenant for life is not justified in throwing the costs of obtaining the concurrence of his mortgagees upon the inheritance, though cases may arise where it would be proper.

For these reasons, without assenting to the entire reasoning of Mr. Justice *Chitty*, I am of opinion that the result at which he arrived is right, and that the appeal ought to be dismissed with costs.

Solicitors: *Walker & Mewburn-Walker; A. R. & H. Steele.*

(1) 40 Ch. D. 343.

H. C. J.

In re MARTIN (A LUNATIC).

C. A.
1889
April 9, 16.

Solicitor—Costs—Taxation—Solicitors' Remuneration Act, 1881, *s.* 2—*Business connected with Lease—Abortive Negotiations—General Order under Solicitors' Remuneration Act*, 1881, *r.* 2 (*b*), (*c*), *Schedule I., Part* 2.

The remuneration of a lessor's solicitor prescribed in the General Order under the *Solicitors' Remuneration Act*, 1881, Schedule I., Part 2, does not cover negotiations carried on by the solicitor as to the letting of the property with persons other than the person to whom the lease is ultimately granted. The solicitor is entitled to remuneration for such negotiations as business "which is not in fact completed" under Rule 2 (*c*) of the same General Order.

In re Field (1) and *In re Emanuel & Simmonds* (2) distinguished.

MR. *G. W. BARNARD* was employed by the committee of a lunatic to act as his solicitor in reference to the letting of a house which formed part of the lunatic's estate.

On the 8th of December, 1887, the committee put up in the window of the house a notice containing the words "To Let," and directing application to be made by persons desirous of taking the house to Mr. *Barnard* for information and particulars. In consequence of this notice several persons applied to Mr. *Barnard*, and he or his clerks shewed them over the house and wrote letters to the applicants, and from time to time reported to the committee the applications and the replies to the letters. In November, 1887, before the house became vacant, an offer to take the house had been made by Mr. *Parkes* to the solicitor, and when it became vacant the solicitor informed Mr. *Parkes* of the terms and particulars, and Mr. *Parkes* renewed his offer, which was accepted by the committee on the 19th of January, 1889. On the 6th of March an order was made in the lunacy directing that the house should be demised to Mr. *Parkes* on the terms contained in a draft lease which had been prepared by the solicitor, and that the reasonable and proper costs, charges, and expenses of the committee of, incident to, and consequent upon the proceedings should be taxed and paid by the committee out of the lunatic's estate, after deducting the taxed costs of the lease and

(1) 29 Ch. D. 608. (2) 33 Ch. D. 40.

C. A.
1889
In re MARTIN (A LUNATIC).

counterpart, which the lessee had agreed to pay. The lease was accordingly granted to Mr. *Parkes*, who paid the scale fees to the lessor's solicitor as prescribed by the General Order under the *Solicitors' Remuneration Act*. The solicitor then carried in his bill of costs against the lunatic's estate for taxation. The bill included items for negotiations with *Parkes*, and also items for negotiations with other persons. The Taxing Master disallowed all the charges other than the sums paid as the scale charge by Schedule I., Part 2. The solicitor acquiesced in the disallowance as to the negotiations with *Parkes*, having regard to *In re Field* (1) and *In re Emanuel & Simmonds* (2); but carried in objections to disallowance of the charges for negotiations with other persons.

The Taxing Master overruled the objections, and gave his reasons for doing so as follows:—

"The committee objects that I have disallowed certain items, which he contends are not covered by the scale charge, because his solicitor considers that, although the scale charge covers the negotiations with the person who ultimately became tenant, he is entitled to charge for negotiations with, and attendances on, all other persons. In the well-known cases of *In re Field* and *In re Emanuel & Simmonds* it was decided that negotiations and an agreement preliminary to the lease were covered by the scale charge, because they were 'business connected with the lease.' In those particular cases the question as to negotiating with other persons than the actual person who became tenant did not arise, but the Taxing Masters have considered that, according to the decisions in those cases, the scale charge covers all business connected with the particular letting, and that all negotiations which lead to the granting a lease are part of such business. The question does not depend on the meaning of the word 'negotiating,' but on whether or not the work in question is 'connected with the lease.' The question raised more or less affects the construction of the scale fees for negotiations expressly given by the General Order. That is, a vendor's solicitor for negotiating a sale; a purchaser's solicitor for negotiating a purchase; a mortgagee's solicitor for negotiating a loan. No separate fee for negotiating is provided for a lessor, lessee, or mortgagor's solicitor,

(1) 29 Ch. D. 608. (2) 33 Ch. D. 40.

but is included in one general *ad valorem* fee for the whole business connected with the lease or mortgage. If the contention of the objectant in this case is valid, it would seem to follow that the negotiating fees expressly provided would not cover negotiations with any persons other than the one who actually sells or buys, or finds the money for a mortgage, and that negotiations with other persons are not connected with the sale, purchase, or mortgage. It would, it is submitted, be inconsistent with the principle of a commission that a solicitor should be entitled to charge in detail for negotiations with several persons, and then a commission for, it may be, one attendance on the one accepted. In the case of the estate agent paid by commission on letting a house, the commission, of course, covers the whole of the negotiations. It would be scarcely possible, in many cases, to ascertain which of the charges made lead up to the actual letting, and which do not; in fact, all must do so more or less. The acceptance or not of the offer of *A.* depends upon what offers may have been made by other persons."

The solicitor then presented a petition in the lunacy for a review of the taxation.

Sir *Horace Davey*, Q.C., and *F. A. Archibald*, for the Petitioner:—

With respect to the negotiations with *Parkes* which led to the granting of the lease we admit that they are covered by *In re Field* (1) and *In re Emanuel & Simmonds* (2), and we do not insist on our objection on that point, but those cases only apply to negotiations leading up to the lease which is eventually signed. Here Mr. *Barnard* had been negotiating with other persons, and the negotiations had become abortive and were concluded before the lease was executed. Therefore the case falls within rule 2 (*c*), not within rule 2 (*b*). The negotiations were going on for several weeks, and it would be unjust that the solicitor should not be paid for them. Supposing the whole matter had become abortive and no lease at all granted, there is no question that he would have been entitled to remuneration under rule 2 (*c*) for all the negotiations. So that if the Taxing

(1) 29 Ch. D. 608. (2) 33 Ch. D. 40.

C. A.
1889
In re MARTIN (A LUNATIC).

Master is right it would lead to this absurd result, that if the solicitor failed in finding a lessee he would be paid for all his trouble, but if he succeeded in eventually finding a lessee he would get no remuneration for anything beyond the preparation and execution of the lease. *Newbould* v. *Bailward* (1), recently decided by the House of Lords, is in our favour.

COTTON, L.J.:—

This is a petition presented by Mr. *Barnard*, a solicitor, to review the taxation of the Master to whom his bill of costs has been referred.

It appears that he was employed by the committee of the estate to see to the letting of a house No. 7, *York Road, Lambeth*, which was part of the property of the lunatic, and a portion of the duty which he performed was getting possession of this house from the previous tenant, who was not a satisfactory one, and those costs have been taxed. Mr. *Parkes*, who ultimately obtained a lease of the premises, made an application in the first instance to Mr. *Barnard*, and between his application and the time when the lease was granted various applications were made by different persons with whom Mr. *Barnard*, the petitioner, acted more or less in negotiating as to whether or not a lease should be granted to them. Of course Mr. *Barnard* was entitled to be paid according to the scale of charges. The Taxing Master has taxed his bill under that scale, but he has disallowed all charges made in Mr. *Barnard's* bill for negotiations preceding the granting of the lease, including all negotiations with the other persons who from time to time applied to him as to this house. Objection to that has been taken, and the result is that this petition has been presented against the Taxing Master's certificate.

Mr. *Barnard* in the first instance objected to all the disallowances of the previous negotiations which had been made by the Taxing Master, but when the case came before us Sir *Horace Davey*, who appeared for the Petitioner, did not press the objection to the disallowance of the charges for the negotiations with Mr. *Parkes*, and that was in accordance with two decisions of this

(1) 14 App. Cas. 1.

Court, which cannot be called in question here. Those cases are *In re Field* (1) and *In re Emanuel & Simmonds* (2). But there may have been negotiations with other persons which were not questioned by those cases, and Sir *Horace Davey* pressed us to review the Master's taxation in that respect.

On this matter we must refer to the Orders and the schedules to the Orders which now regulate a solicitor's remuneration, and the scale of charges which applies to sales, conveyances, and leases. The schedule as to leases in Part II. stands in a different position from the charges and the Orders as regards sales. As regards leases the scale of charges is for leasing or for agreements for leases at rack rents. Then where the rent does not exceed so much, it gives so much to the lessor's solicitor "for preparing, settling, and completing the lease and counterpart." Now if there was that alone, we should not have decided as we did in the two cases that I have referred to. But then we have been referred to the 2nd rule of the General Order which says, "Subject to the exception aforesaid, the remuneration of a solicitor in respect of business, connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business, not being business in any action, or transacted in any Court, or in the Chambers of any Judge or Master, is to be regulated as follows." That is, the scale fee to be his charge in respect of business connected with sales, &c. In the cases to which I have referred the leases had been granted to the persons with whom the negotiations originally took place. There the matters were all connected with the granting of the lease. The schedule to which I have referred only mentions the particular lease which is to be prepared by the solicitor, and which is to be charged for by him, and where, having regard to the 2nd rule, all matters which are really connected with the preparation of the lease or agreement for a lease (that is, where there is only to be an agreement for a lease) are clearly within the words of the 2nd rule. Of course, in some cases it may be hard, and in other cases it will be for the benefit of the solicitor, and will give him more than he would have been able to get if there had been no scale.

(1) 29 Ch. D. 608. (2) 33 Ch. D. 40.

C. A.
1889
In re MARTIN (A LUNATIC).
Cotton, L.J.

But then there is a direction as to the thing done where the business is not completed; and, in my opinion, where there are negotiations for a lease, which have entirely concluded without having produced any lease at all, the solicitor must get his claim allowed under the direction of business which is not completed. I think it would be wrong, if there was a negotiation entirely at an end before the fresh negotiation had begun with the person to whom the lease was granted, that there should be no claim for the business done in respect of the completed negotiation which led to no lease, and therefore which did not come in any way within the schedule to which I have referred. It would be wrong to extend the cases of *In re Field* (1) and *In re Emanuel & Simmonds* (2) to a case like this, where there were negotiations with persons who were intending to be but who were not lessees, and who were persons to whom no lease was granted. If we extended those cases to these negotiations the solicitor would get no payment at all for the trouble and business he had undertaken between the parties. Of course, it would be a question for the Taxing Master to consider what allowance ought to be made to a solicitor for the work involved in these negotiations which led to nothing, but in my opinion, here the Taxing Master was wrong in laying down this rule so fully, that as regards the claim for negotiations with persons other than Mr. *Parkes*, he is entitled to disregard them, and not to enter into the question of whether any sum is properly payable in respect of those negotiations.

As regards the negotiations with Mr. *Parkes*, those would be all business connected with the lease which was actually granted, and in respect of which the solicitor would be paid his charges, which would include all business connected with that matter; but as regards the other negotiations all of which in this case were between the first application of Mr. *Parkes* and the granting of the lease, I think we ought to send the matter back to the Taxing Master to review his taxation, and to consider what is properly payable to the solicitor, treating these negotiations as being negotiations with other persons which did not lead to any lease at all. As regards the business actually connected with the lease which was executed, that is covered by the scale charge.

(1) 29 Ch. D. 608. (2) 33 Ch. D. 40.

We are of opinion that the matter ought to go back to the Master in order to reconsider what remuneration ought to be allowed to the solicitor.

LINDLEY, L.J.:—

This question turns upon the true construction of the rules under the *Solicitors' Remuneration Act*, 1881, and especially rule 2, sub-sect. (*b*), and Schedule I, Part 2, which have all to be read together, and the question which we have to consider is whether the work for which Mr. *Barnard* now asks that he may receive compensation in addition to the scale charge is or is not covered by the scale charge when construed by the rules to which I have referred.

Now it appears to me that when we understand rule 2, sub-sect. (*b*), and Schedule I, Part 2, the result is that this particular work for which he seeks to be remunerated is not covered by the scale of charges. If it were, the amount of the scale of charges is all that he could recover.

I need add nothing to what the Lord Justice has said, except perhaps this, that it appears to me that this decision is consistent with *In re Field* (1), and is more in accordance with the principle on which the House of Lords acted in *Newbould* v. *Bailward* (2) than the opposite conclusion would be.

It seems to me therefore that Mr. *Barnard* is entitled to these charges, subject of course to taxation.

Solicitor: *G. W. Barnard.*

(1) 29 Ch. D. 608. (2) 14 App. Cas. 1.

M. W.

KAY, J.
1889
March 19, 20, 26.

BRIGHT v. CAMPBELL.

[1858 B. 327.]

Mortgage—Proviso for Reduction of Interest—Mortgagee in possession—Accounts—Right to higher Rate of Interest.

A proviso in a mortgage for reduction of interest on punctual payment does not apply to the case of the mortgagee taking possession and receiving the rents, whether he does so by arrangement with the mortgagor or otherwise; and accordingly the mortgagee will be allowed, in his accounts as mortgagee in possession, the higher rate of interest, even though there was no interest in arrear at the time of taking possession.

By an indenture dated the 26th of March, 1847, a freehold factory at *Holloway* was conveyed by and by the direction of *Robert William Sievier* to *William Boggett* and *Lucy Jay* in fee, by way of mortgage, for securing the repayment to them of £3000 and interest. The deed contained the usual covenant by the mortgagor, *Sievier*, for payment of interest half-yearly at 5 per cent. per annum; also the usual power of sale in a case of default; and also a power for the mortgagees to grant leases of the property until sale. And it was agreed and declared that the mortgagees "shall, with and out of the proceeds arising from any such sale or sales, lease or leases, in the first place pay and retain all costs, charges, and expenses incurred or sustained in or about the exercise of the said powers of sale and demise respectively, or any matter or thing incidental or relating thereto, or otherwise occasioned by such default in payment as aforesaid; and in the next place pay and retain all principal money and interest then unpaid and owing on the security of these presents, and pay the residue or surplus of such proceeds (if any) unto the said *R. W. Sievier*, his heirs, executors, administrators, and assigns." Then, towards the end of the deed, there was a proviso for reduction of interest on punctual payment in the following form:—

"Provided always, and it is hereby agreed and declared, that if the said *R. W. Sievier*, his heirs, executors, or administrators, shall from time to time, during so long as the said principal sum of £3000, or any part thereof, shall remain due and owing on the

security of these presents, punctually pay, or cause to be paid, unto the said *W. Boggett* and *L. Jay*, their executors, administrators, or assigns, in manner aforesaid, interest for the same after the rate of £4 10*s.* for every £100 by the year, upon or within one calendar month next after the said 29th day of September and the said 25th day of March"—the half-yearly days fixed for payment of interest—"respectively in every year, clear of all deductions whatsoever; then, in consideration of such punctual payment, the said *W. Boggett* and *L. Jay*, their executors, administrators, or assigns, will from time to time, so often as the same interest shall be paid at or within the days or times and space aforesaid, but not otherwise, accept and take interest for the said sum of £3000, or such part thereof as aforesaid, after that reduced rate of interest, in lieu and satisfaction of the larger interest, anything hereinbefore contained notwithstanding."

On the 16th of December, 1847, *R. W. Sievier*, the mortgagor, entered into an agreement for a lease of the factory to *William Fothergill Cooke* for twenty years from the 24th of June, 1850, at the yearly rent of £150.

On the 30th of May, 1848, *Sievier* mortgaged the equity of redemption in the factory to *Wynne Ellis* for £800, and interest at 5 per cent., and on the 15th of June, 1848, gave *Ellis* a further charge for £150 and interest.

On the 15th of December, 1848, *Sievier*, having agreed with the first mortgagees, *Boggett* and *Jay*, that they should take possession of the mortgaged premises, gave a written authority and request to *Cooke* to pay his rent to them, the rent amounting to the same sum as the 5 per cent. interest on the first mortgage. *Boggett* and *Jay* accordingly took possession as agreed, there being then no arrears of interest under the mortgage; but it appeared from the mortgage account in this action that they did not commence actually to receive rent until two years afterwards, and that during that interval the interest fell into arrear.

On the 24th of November, 1853, *Wynne Ellis*, the second mortgagee, transferred his mortgage to the Plaintiff, *Thomas Bright*, who by an indenture of even date declared trusts of the mortgage for himself and the Plaintiff, *George Fagg*, who had found part of the money to pay off *Ellis*.

KAY, J.
1889
BRIGHT
v.
CAMPBELL.

On the 28th of September, 1858, *Boggett* and *Jay*, the first mortgagees, who had continued in receipt of the rents as mortgagees in possession, transferred their mortgage to the Defendant, *Archibald Samuels Campbell.*

On the 23rd December, 1858, *Bright* and *Fagg* filed the bill in this action against *Campbell* and others for redemption.

By the decree dated the 17th of December, 1862, it was declared that the Plaintiffs had a right to redeem, and that the Defendant *Campbell*, under the transfer from *Boggett* and *Jay*, became liable to account for rents and profits in the same manner as *Boggett* and *Jay* were liable to account by virtue of their possession and receipt of such rents and profits, and the same was decreed accordingly; and accounts and inquiries were directed as to the rents and profits of the mortgaged premises from the time *Boggett* and *Jay* took possession, which had been received by them or by the Defendant *Campbell* as mortgagees, or mortgagees in possession. Then followed the usual directions for accounts and inquiries as to principal, interest, and costs due to the Defendant *Campbell* as mortgagee, with a direction that what should be found due from him for rents and profits should be deducted from the amount due to him for principal, interest, and costs; and it was ordered that upon payment of the balance due to him within six months from the Chief Clerk's certificate, the Defendant *Campbell* should re-convey to the Plaintiffs, or that in default their right to redeem should be foreclosed.

By his certificate, dated the 16th of November, 1888, the Chief Clerk found that there was due from the Defendant *Campbell* for rents and profits received from the 15th of December, 1848, when possession was taken by *Boggett* and *Jay*, a large balance, after allowing for principal and interest due to him as mortgagee, such interest being calculated at 4½ per cent., the lower rate charged under the original mortgage.

This was a summons by the present Defendants, *Campbell's* successors in title, to vary the Chief Clerk's certificate by allowing interest at 5 per cent., the higher rate under the mortgage.

Marten, Q.C., and *Hadley*, for the Applicants:—

We submit that the higher rate of interest should have been

allowed; receipt of rents by the mortgagee in possession not being payment of interest by the mortgagor so as to entitle him to the benefit of the proviso for reduction of interest on punctual payment: *Union Bank of London* v. *Ingram* (1); *Cockburn* v. *Edwards* (2).

Horton Smith, Q.C., *Byrne*, Q.C., and *Ellis*, for the Plaintiffs:—

The decisions in the two cases cited proceeded on the ground that it was no part of the bargain between the mortgagor and the mortgagee that the latter should, when in possession, receive the rents in payment of interest; but in the present case there is such a bargain, for there is an express provision in the mortgage that the mortgagees shall, out of the proceeds of any sale or lease, "pay and retain all principal money and interest then unpaid." That is a distinct agreement that the rents shall be appropriated to payment of interest at the lower rate.

Ince, Q.C., and *W. C. Fooks*, for parties beneficially interested under the will of *Sievier*, the mortgagor, since deceased:—

In each of the two cases cited, when the mortgagee took possession, the mortgagor was in arrear with his interest, having, in *Union Bank of London* v. *Ingram*, never in fact paid any interest at all. Moreover, the passage relied on in the judgment in *Cockburn* v. *Edwards* (3) is a mere *dictum*. We submit that neither of those decisions is applicable to a case such as the present, where the mortgagee takes possession by agreement with the mortgagor, there being no interest then in arrear.

Blackmore, for the trustee of *Sievier's* will.

Marten, in reply:—

Although the interest was not in arrear when possession was taken, it fell into arrear afterwards, so that the mortgagor lost whatever right he may have had to be charged only the lower rate of interest.

(1) 16 Ch. D. 53. (2) 18 Ch. D. 449, 457.
(3) 18 Ch. D. 457.

KAY, J.
1889
BRIGHT
v.
CAMPBELL.

1889. Mar. 26. KAY, J.:—

The question I have to consider is, what rate of interest is the mortgagee entitled to charge? The rate of interest in the mortgage was 5 per cent., but then it was reducible, if the mortgagor paid within a month, to 4½ per cent.; and it is said that as the mortgagee has been in possession of the mortgaged property, he ought not to charge more than 4½ per cent., and the Chief Clerk has taken that view. However, there are two authorities before the late Master of the Rolls in which he held distinctly that this was not the view to be taken in the case of a mortgagee in possession; and the ground of his so holding was this—that the rent received by the mortgagee is not interest; he has the right to be paid the rent, and his duty is to apply it, as far as he can, to the interest due, and any balance of that rent goes to pay off so much of the capital, and so on; but the Master of the Rolls says it is not interest in any way. In taking possession the mortgagee is exercising his legal right. The clause in the mortgage deed, reducing the interest agreed upon on prompt payment, is put in to induce the mortgagor, while in possession, to pay his interest punctually, and to save the mortgagee from the trouble and responsibility of taking possession; but if the mortgagee is driven to take that very troublesome and responsible position of going into possession, then, says the late Master of the Rolls, the clause does not apply. I doubt whether I should have arrived at the same conclusion by my own unaided judgment—but there are the decisions, and I must treat them with all respect as completely binding upon me: therefore I do not say that I dissent from them in any way. I do not know that I should have originated such a doctrine if the question had first of all come before me, but I must follow those decisions if they apply to this particular case.

Now, what is this particular case? The first mortgagees took possession by agreement; and it is said that when they took possession there was no interest in arrear: and so it appears from the account, which begins, as far as interest is concerned, from the date when they did take possession. Therefore it is said that, inasmuch as possession was taken by agreement when there was no interest in arrear, the rule laid down by the authorities to

which I have referred does not apply. But the rule which the Master of the Rolls lays down is that inasmuch as a mortgagee in possession, being in that responsible position, is to be charged not merely for what he has actually received, but for what he may have received but for his wilful default, the rent which he receives is not to be treated as interest, and is not a payment direct from the mortgagor to him. If that be the reason why the rate of interest is not to be reduced when the mortgagee is in possession, it applies equally to a case in which he takes possession after default in payment of principal, though no interest is in arrear. It is said that the mortgagees' account shews that the interest became largely in arrear after they did take possession, because they did not receive rent until after two years from the time possession was so taken; but I think that is a matter outside the decision of the Master of the Rolls, which decision I must follow. I take the meaning of that decision to be that, where the mortgagee, by agreement or otherwise, is put into the extremely responsible and disagreeable position of being in possession, then this clause for reduction of interest, which was inserted in the mortgage in order to induce the mortgagor to prevent the necessity of the mortgagee taking possession, does not apply to the case at all. That being, as I understand, the result of the decision, it seems to me to be applicable here; and accordingly I must hold that the rate of interest to be charged must be, not 4½ per cent., but 5 per cent.

Solicitors: *Ewbank & Partington; Cobbold & Woolley; J. Holder; Braithwaite.*

G. I. F. C.

KAY, J.

1889

March 30; April 6.

DUNCAN *v.* LAWSON.

Domicil—Intestacy—Lex Loci—Leaseholds—Bequests invalid by English Law—Devolution of English Leaseholds belonging to domiciled Scotchman.

Leaseholds in *England*, belonging to a domiciled Scotchman, devolve, in case of his intestacy, upon the persons entitled according to the English *Statute of Distributions*.

PETITION for the opinion of the Court upon a special case remitted by the Court of Session in *Scotland*, pursuant to the *Law Ascertainment Act* (22 & 23 Vict. c. 63), as to questions arising in an action of declarator, &c., in that Court, in which the Petitioners, *Alexander Duncan*, *David Sim White*, and *John Blair* were Pursuers, and the Respondent, *William Lawson*, was Defender.

David Gavin Hewit, a domiciled Scotchman, who died on the 1st of August, 1887, left a trust disposition and settlement dated the 21st of May, 1887, whereby he gave all his real and personal property to the Petitioners and Respondent upon trust to pay certain annuities and pecuniary legacies, including legacies to charitable institutions which he named, and as to the residue of his estate directed his trustees, in the event (which happened) of the failure of his child or children and their issue before the period therein mentioned, to pay certain pecuniary legacies to his wife and three nephews, and to divide and apportion the balance in such shares as they (his trustees) might consider best among certain specified charitable institutions. The testator empowered his trustees to sell and convert into money the whole of his estate or any part thereof, and appointed them his executors.

The testator's residuary estate included freehold and leasehold property, situate in *England*.

By the case remitted the opinion of the Court was requested as to the validity of the charitable bequests so far as payable out of the testator's English freehold and leasehold property, and, amongst other questions submitted, the Court was requested to advise, assuming that the charitable bequests, so far as payable out of such property, were null and void, who would be entitled to take the sums which would have gone to satisfy those bequests.

It was not disputed that the charitable bequests were void by English law, and the only question argued was whether the persons beneficially entitled to such of the sums last referred to as represented leasehold property of the testator were to be ascertained according to the law of *England*, or according to the law of *Scotland*.

Rigby, Q.C., and *Brodie Innes*, for the Petitioners, submitted the case to the Court.

Sir *H. Davey*, Q.C. (*Renshaw*, Q.C., and *Younger*, with him), for the Respondent:—

The law of *Scotland* must be regarded in order to ascertain the persons beneficially entitled to the leaseholds. As they are *immobilia* the rule *mobilia sequuntur personam* does not apply; and they pass by the *lex loci rei sitæ*, the law of *England*, to the executor as heir *in mobilibus*. But then the question arises how the executor is to deal with the beneficial interest. By the law of *England* he is to deal with that interest as with the other personal estate of the deceased, that is, according to the law of his domicil. The cases are quite consistent with that view. *Freke* v. *Lord Carbery* (1) merely decided that the rule *mobilia sequuntur personam* does not apply to leaseholds. And in the case of *In the Goods of Gentili* (2) the husband of a deceased Italian woman who possessed leaseholds in *Ireland* was held entitled by the *lex loci* to general administration, although by the law of *Italy* he was beneficially entitled to a limited interest only.

[He referred also to *Dicey* on Domicil (3); *Jarman* on Wills (4), and *Du Hourmelin* v. *Sheldon* (5).]

Rigby, in reply:—

The law of *England*, the *lex loci rei sitæ*, and that law alone, must determine the devolution of these leaseholds. The executor is not heir *in mobilibus*; his title is not complete until probate. He is no more heir *in mobilibus* than is an administrator, who may be a mere creditor of the deceased. The law of *England* is not

(1) Law Rep. 16 Eq. 461.
(2) I. R. 9 Eq. 541.
(3) Page 191.
(4) 4th Ed. vol. i. p. 4, note.
(5) 4 My. & Cr. 525.

KAY, J.
1889
DUNCAN
v.
LAWSON.

that leaseholds follow the devolution of the other personal estate of the deceased owner, but that they are personal estate, and that they go, in case of intestacy, to the persons entitled under the *Statute of Distributions*, that statute being in effect, as was said by Lord *Cairns* in *Cooper* v. *Cooper* (1) a will made by the Legislature for an intestate. The law of *England* is not that personal estate follows the person, but only that moveables do so. The cases of *Freke* v. *Lord Carbery* (2) and *In the Goods of Gentili* (3), are express authorities that the *lex loci* determines the devolution of all *immobilia* alike—of leaseholds as fully as of real estate.

1889. April 6. KAY, J.:—

The opinion of the Court is required by the Court of Session in *Scotland*, which has approved and remitted to this Court a case under the Act 22 & 23 Vict. c. 63. Upon several of the matters submitted no doubt can be entertained. One question of considerable interest has been argued.

The question arises under a Scotch will—more properly a trust disposition and settlement—of *David Gavin Hewit*. He was a domiciled Scotchman, and possessed freehold and leasehold estate in *England*. He gave all his real and personal property to trustees, with power to convert, and directed them to pay certain pecuniary legacies to charities in *England* and *Scotland*. And he disposed of the ultimate residue of his trust estate, on failure of his issue, among certain specified charities.

The validity of these gifts, so far as they are payable out of the proceeds of English freehold or leasehold property, must depend on the *lex loci rei sitæ*, which in *England* renders charitable gifts by will of real or leasehold property void. The contest arises upon the question who are to take the English property which would have gone to satisfy these bequests. The pecuniary legacies in an English will so framed would, so far as they failed, fall into and increase the residue. The gifts of residue, so far as they failed, would be undisposed of and devolve as upon an intestacy. This, as all the residue is divided among charities, would not alter the quantity of property undisposed of.

(1) Law Rep. 7 H. L. 53, 66. (2) Law Rep. 16 Eq. 461.
(3) I. R. 9 Eq. 541.

There is no doubt as to the devolution of the English freeholds so far as undisposed of by the will. These, or the proceeds of any converted under the will, would descend as real estate, and would belong to the testator's heir-at-law at the time of his death, assuming that the testator had acquired them as a purchaser and not by inheritance: see 3 & 4 Will. 4, c. 106.

The question which has been argued is whether the next of kin of the testator according to English or Scotch law are entitled to the undisposed of leaseholds or the proceeds thereof. *Mobilia sequuntur personam*; and the law of the domicil undoubtedly regulates succession to moveable property; but the reason for this is that moveables have no locality in law. It is argued that the leaseholds undisposed of, although *immobilia*, belong to the executor, who would be bound to deal with the beneficial interest in them as with other undisposed of personal estate, treating them as personal property by the *lex loci*, and therefore dealing with the beneficial interest in *mobilia* and these *immobilia* in the same way; and that accordingly the beneficial interest must devolve according to the law of the domicil. But the *lex loci* governs the devolution of *immobilia* in case of intestacy, just as it does of freehold property. There is no possibility of doubt that, if the Scotch heir and the English heir were different persons, the English heir and not the Scotch heir would take the undisposed of freeholds in *England*. The executor is merely the hand to effect the distribution of personal estate. As to the persons entitled under the distribution to succeed to the undisposed of leaseholds, the *lex loci* must govern, or it would practically have no effect at all. The matter is more clear if you take the case of an absolute intestacy, where no executor has been appointed. As to English leaseholds, the Probate Court in *England* would in that case be called on to appoint an administrator. No doubt such administrator would be chosen from the next of kin according to English law, and it would be his duty, subject to the satisfaction of the testator's debts, probate duty, and the like, to distribute the leaseholds among the persons entitled. At this stage of the proceeding the *lex loci* must determine, independently of the testator's domicil, to whom such distribution must be made.

KAY, J.
1889
DUNCAN
v.
LAWSON.

Such authority as there is upon the subject is in favour of this view. In *Freke* v. *Lord Carbery* (1), where an Irish testator bequeathed, amongst other property, a leasehold house in *London* upon trust to accumulate the rents, Lord *Selborne* held that the *Thellusson Act* applied, although it is not operative in *Ireland*. In answer to the argument that, according to the *lex loci*, leaseholds in *London* are personal estate, and therefore come within the rule *mobilia sequuntur personam*, Lord *Selborne* said: "When '*mobilia*' are in places other than that of the person to whom they belong, their accidental *situs* is disregarded, and they are held to go with the person. But land, whether held for a chattel interest or held for a freehold interest, is in nature, as a matter of fact, immoveable and not moveable. The doctrine is inapplicable to it."

In *In the Goods of Gentili* (2), a married woman domiciled in *Italy* died there possessed of leaseholds in *Ireland*. Her husband, who survived her, was only entitled by Italian law to a limited interest in these leaseholds, but by the law of *Ireland*, the *lex loci*, he was entitled absolutely. It was held that the grant of administration should be unqualified. In the very lucid and able judgment in that case, *Freke* v. *Lord Carbery* is referred to as a distinct authority "that the succession to chattels real depended on the *lex loci*," which the learned Judge (3) states to be his own opinion also (4).

His Lordship then answered in detail the several questions propounded for the opinion of the Court, and expressed the opinion that the persons entitled to take the sums which would have gone to satisfy the charitable bequests, so far as they were payable out of English freehold and leasehold estates, if such bequests had not been invalid, were, as to the leasehold property or the proceeds thereof, the persons entitled to the testator's personal estate according to the English *Statute of Distributions*.

Solicitors: *Faithfull & Owen*, agents for *Morton, Smart, & Macdonald, W.S., Edinburgh; Neish & Howell*, agents for *Davidson & Syme, W.S., Edinburgh*.

(1) Law Rep. 16 Eq. 461, 466.
(2) I. R. 9 Eq. 541.
(3) *Warren*, J.
(4) See also *De Fogassieras* v. *Duport*, 11 L. R. Ir. 123.

C. C. M. D.

BLAKER *v.* HERTS AND ESSEX WATERWORKS COMPANY.

KAY, J.
1889
April 15.

[1888 B. 3896.]

Company—Debenture—Waterworks—Undertaking, whether public or private —Rights of unpaid Debenture-holders as to Sale of Undertaking or Appointment of Manager—Power of Sale under Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 19.

Sect. 19 of the *Conveyancing and Law of Property Act,* 1881, conferring on a mortgagee, where the mortgage is by deed, a power of sale, does not apply to the debentures of a joint stock company.

By a Provisional Order under the *Gas and Water Works Facilities Act,* 1870, authorizing a waterworks undertaking, two individuals, "and the survivor of them and the executors or administrators of such survivor, their or his assigns" were declared to be the "undertakers" for the purposes of the Order, and power was conferred on the undertakers to acquire lands by agreement (but not compulsorily), to construct waterworks, and to supply water to the inhabitants of a district and charge rates for such supply, the amount of the capital of the undertaking was specified, and the amount of all moneys borrowed by the undertakers and "secured by mortgage of the undertaking" was not at any time to exceed a specified sum. The undertaking was assigned to a limited company formed for that purpose, and the company issued debentures whereby they "charged" their undertaking, lands, works, property and effects (both present and future) with repayment of the money borrowed, the charge being expressed to be a floating security not hindering any sale, exchange, or lease of the lands, or the receipt or payment of any moneys, or any other dealings in the course of the business of the company, but attaching to all the property for the time being, whether real or personal, of the company. By a subsequent Provisional Order further powers were conferred on the company, and they only were recognised as undertakers for the purposes of that Order. The company afterwards made default in payment of the principal moneys secured by the debentures on the day named therein for payment. In an action by debenture-holders claiming (amongst other relief) a sale of the undertaking and property comprised in the debentures as a going concern, and the appointment of a manager until sale:—

Held, that, the waterworks undertaking being for a public purpose and not a mere private undertaking, the principle of the decision in *Gardner* v. *London, Chatham, and Dover Railway Company* (1) was applicable; that the debentures did not confer upon the holders of them a power to sell the undertaking; and that the Court ought not to direct a sale of the undertaking or the appointment of a manager.

BY the *Gas and Water Works Facilities Act,* 1870 (33 & 34 Vict. c. 70), sect. 4, "Provisional Orders authorizing any gas under-

(1) Law Rep. 2 Ch. 201.

KAY, J.
1889
BLAKER
v.
HERTS AND
ESSEX
WATERWORKS
COMPANY.

taking or water undertaking under the authority of this Act may be obtained in any district by any company, companies, or person; and in the construction of this Act the term 'the undertakers' shall be deemed to include any such company, companies, or person. Where the undertakers require powers for the purpose of constructing gasworks or waterworks, or works connected therewith within any district, the consent of the local authority of such district shall be necessary before any Provisional Order can be obtained; and where in such district there is a road authority distinct from the local authority, the consent of such road authority shall also be necessary in any case where power is sought to break up any road of such road authority, before any Provisional Order can be obtained." The Act provides the mode in which Provisional Orders are to be obtained from the Board of Trade.

In the year 1879, under the provisions of this Act, a Provisional Order entitled "*The Herts and Essex Water Order*, 1879" was obtained, which provided by clause 5 as follows: "*William Russ* and *Charles Minns*, and the survivor of them, and the executors or administrators of such survivor, their or his assigns, shall be the undertakers for the purposes of this Order, and are in this Order referred to as the 'undertakers.'" By clause 6 the capital of the undertakers for the purposes of the undertaking authorized by the Order was not to exceed £25,000, unless the undertakers were authorized to raise additional capital by Provisional Order under the *Gas and Water Works Facilities Act*, 1870, or by Act of Parliament. Clause 7 (which was the only clause in the Order having reference to the borrowing powers of the undertakers) was as follows: "The amount of all moneys borrowed by the undertakers and secured by mortgage of the undertaking . . . shall not at any time exceed in the whole £6250, and no higher rate of interest than £5 per centum per annum shall be paid by the undertakers without the consent of the Board of Trade in respect of any moneys borrowed by the undertakers and secured as aforesaid."

The undertakers were empowered to purchase by agreement and use such of the lands shewn on the deposited plans as they might require for the purposes of the undertaking, but no

compulsory powers of acquiring lands were given to them. Powers were given to them to construct waterworks, to supply water within specified limits, and to charge rates for such supply, and the particular works to be constructed were defined. Provision was made for the purity of the water, and penalties were imposed on the undertakers in case the water supplied was of less purity than it ought to be. The Order was duly confirmed by Act of Parliament.

BENGAL SECRETARIAT LIBRARY

The works authorized by the Order were constructed, and in the year 1883 the Defendants were formed as a limited company under the *Companies Act*, 1862, for the purpose of purchasing the undertaking, the purchase-money being payable in shares and debentures to be issued by the company. The undertaking (which was then vested by assignment in one *Easton*) was duly assigned to the Defendants, and, as part of the purchase-money, they, in September 1883, issued 125 debentures of £50 each. By each of these debentures (which were under the seal of the company), in consideration of £50 paid, the company covenanted to pay to the bearer on the 1st of July, 1888, the sum of £50, and to pay interest in the meantime at 5 per cent., and the debenture proceeded as follows: "And the company do hereby charge with such payment the undertaking, lands, works, plant, property, and effects (both present and future) of the company, to the intent that this security and the other securities forming part of the above-mentioned issue of £6250 may rank equally as a first charge upon the said undertaking, lands, works, plant, property, and effects (both present and future), but so that the same may be a floating security, not hindering any sale, exchange, or lease of the said lands or any part thereof, or the receipt or payment of any moneys, or any other dealings in the course of the business of the company, but attaching to the premises leased, and the proceeds of any sale or exchange, and the lands or property purchased therewith, and all other the property for the time being, whether real or personal, of the company."

In the year 1885 another Provisional Order, entitled "*The Herts and Essex Water Order*, 1885," was obtained under the powers of the Act of 1870. By this Order, which was to be

KAY, J.
1889
BLAKER
v.
HERTS AND ESSEX WATERWORKS COMPANY.

construed together with the Order of 1879, it was provided that the company "shall be the undertakers for the purposes of this Order, and are in this Order referred to as 'the undertakers.'" The undertakers were empowered on the lands upon which their existing waterworks were situate, so long as they were possessed of such lands, to maintain, continue, alter, enlarge, and improve the waterworks; to exercise their powers within extended limits of supply, and to raise additional share and debenture capital. This Order was duly confirmed by Act of Parliament.

The Plaintiffs, *R. Blaker*, *Evelyn B. Blaker*, and *Isabel B. Dendy*, held between them 46 of the 125 debentures issued in 1883. The Defendants made default in payment of the principal sums payable on the 1st of July, 1888, and of the half-yearly payments of interest then due, and the Plaintiffs, on behalf of themselves and the other debenture holders, brought this action claiming a declaration that they were entitled to a charge on the undertaking, lands, works, plant, property, and effects (both present and future) of the Defendant company to secure the principal and interest due on the debentures, an account of what was due on the debentures, that the undertaking and other property and effects of the company comprised in the debentures might be sold as a going concern, or in the alternative foreclosure, and the appointment of a receiver and manager until sale or foreclosure.

The Defendants by their statement of defence pleaded that the Plaintiffs were not entitled to sale or foreclosure or to have a manager appointed.

On the 12th of September, 1888, an order was made for the appointment of a receiver and manager of all the property and assets comprised in or subject to the securities created by the debentures, and by an order made on the 21st of January, 1889, *L. H. Evans* was appointed such receiver and manager.

On the action now coming on for trial the questions were argued whether the Plaintiffs were entitled to judgment for sale, and whether the orders appointing a manager were rightly made.

Renshaw, Q.C., and *Frederic Thompson*, for the Plaintiffs:—

Under their debentures the Plaintiffs are entitled to judgment

for sale of the company's property, and the appointment of a manager. The principle of *Gardner* v. *London, Chatham, and Dover Railway Company* (1) does not apply, as this is not the case of a mortgage of a public undertaking. By the Provisional Order of 1879 the undertakers were two individuals or their assigns. These undertakers, like any other private owners, had power to assign and dispose of their property by way of mortgage or otherwise, subject only to the limit as to borrowing defined by clause 7. They had no compulsory powers, but could only take lands by agreement; they could only acquire their powers with the consent of the local authorities, and it was not imperative upon them to exercise their powers when so acquired. The Defendant company were simply purchasers and assigns of the undertaking; it was a mere accident that they were a company; they were in no higher position than any private purchaser, and their case was wholly different from that of a public company originally constituted for the purpose of a waterworks undertaking. As the company succeeded to the position of the original undertakers the debentures issued to the Plaintiffs were in effect mortgages given by the owners of a private undertaking, and constituted the Plaintiffs assigns of all the real and personal property of the mortgagors. By virtue of sect. 19 of the *Conveyancing Act*, 1881, which applies by sect. 4 to "any charge on any property for securing money or money's worth," the Plaintiffs became entitled to a power of sale. The debentures were "floating" securities only until the day for payment; after that day, when default in payment was made, they ceased to be floating securities. The Provisional Order of 1885 does not affect the case, as it could not vary the rights of the holders of debentures previously issued. Moreover, although it defines the company, and not their assigns, as being the undertakers, yet it obviously contemplates assignment, as it refers to the exercise of powers by the company "so long as they are possessed of" lands upon which the waterworks are situate.

Marten, Q.C., and *J. T. Prior*, for the Defendant company:—

No judgment for sale ought to be given, and the orders which

(1) Law Rep. 2 Ch. 201, 212.

KAY, J.
1889
BLAKER
v.
HERTS AND
ESSEX
WATERWORKS
COMPANY.

have been made in the action, so far as they extend to the appointment of a manager, ought to be discharged. *Gardner* v. *London, Chatham, and Dover Railway Company* (1) is expressly in point. The waterworks undertaking authorized by the Provisional Order of 1879 was a public undertaking within the principle of that case. Under that Order the undertakers had special duties towards the public, and powers as to the supply of water and of charging rates for such supply, and were liable to penalties for breach of duty. The holders of the debentures issued in 1883, having a mere charge in the nature of a floating security, were neither legal assigns nor assigns within the meaning of the Order. In *Gardner* v. *London, Chatham, and Dover Railway Company* the security of the debenture-holders went further than in this case, because there was an assignment and not a mere charge, and yet it was there held that the debentures were a charge only on the undertaking, on the fruit of the fruit-bearing tree represented by the completed work of the company: see the language of Lord *Cairns* at page 217. By the Provisional Order of 1885 the company only were recognised as undertakers. After the passing of that Order it was not in their power to assign, and no sale could be made by the Court so as to give the purchasers the powers of the undertakers. The debentures were not to hinder "any dealings in the course of the business of the company;" the debenture-holders having thus authorized the company to deal as they thought fit with their property were bound by the Order of 1885.

Renshaw, in reply, referred to *In re Panama, New Zealand, and Australian Royal Mail Company* (2).

KAY, J.:—

This action is brought by three debenture-holders seeking to have a realization of the property comprised in their debentures, and they sue on behalf of themselves and all other debenture-holders. The debentures are those of a company formed under the *Companies Act*, 1862, for the purpose of taking over from the original undertakers certain waterworks which had been

(1) Law Rep. 2 Ch. 201. (2) Law Rep. 5 Ch. 318.

constructed by them under the powers of the *Gas and Water Works Facilities Act*, 1870. [His Lordship referred to sect. 4 of the Act, and to the terms of the Provisional Order of 1879, as above set out, and continued:—] It is obvious from the terms of the Order that it was intended solely as a mode of providing waterworks for a particular district. That is manifestly a purpose entirely public, and it is to be observed that the mortgage referred to in clause 7 of the Order is a mortgage of the undertaking only. I do not know what power of mortgaging was given by the statute. My attention has not been called to any part of any Act of Parliament which gives a power to mortgage. The only mortgage referred to in the Order of 1879 is the mortgage of the undertaking which is authorized by that Order. Pausing there, it would seem that it was contemplated (without any special power for that purpose being given) that the undertakers might raise by mortgage of the undertaking money which was not to exceed £6250, at a rate of interest not higher than 5 per cent. [His Lordship then stated the facts in reference to the assignment of the undertaking to the Defendant company, and the issue of the debentures, and having referred to the form of one of the debentures, continued:—] Now the next question I have to consider is what was the meaning of the parties who entered into this debenture. I observe that the words of the debenture are larger than those of the Provisional Order, because in the Order it was the "undertaking" and nothing else which was to be mortgaged. The words of the debenture, however, contain a very distinct intimation that the contract between the parties was that this debenture should not hinder "any dealings in the course of the business of the company." The debenture, therefore, is only a charge on the undertaking, and a charge of such a nature as not to hinder any dealings in the course of the company's business. But it is said that is true enough until the day for payment arrives, but that after the day for payment, if all the mortgagees agree, they may themselves sell the property under the powers contained in sect. 19 of the *Conveyancing Act*, and if they cannot all agree any one or more may come and, on behalf of all, get the Court to sell. But, in the first place, no power of sale is mentioned in these debentures, and, in the second place, I

KAY, J
1889
BLAKER
v.
HERTS AND ESSEX WATERWORKS COMPANY.

do not at all agree that the *Conveyancing Act* applies to a charge of this kind. It applies to an equitable mortgage, no doubt; but it does not mention in the interpretation clause, or in any other part of the Act that I am aware of, debentures as one of the charges to which it is to apply. I should have expected that an Act of that kind, if it meant to give to a debenture-holder—that is, to the holder, *pari passu* with others, of a charge created by a company—a power of sale, would have done so in very express words indeed. I find nothing in the Act of Parliament which refers to debentures, and I am therefore clearly of opinion that the power in the *Conveyancing Act* does not apply to debentures of a company.

But then the question arises, can the Court, under the jurisdiction conferred formerly by 15 & 16 Vict. c. 86, and now by the 25th section of the *Conveyancing Act*, direct a sale? [His Lordship referred to the section of the *Conveyancing Act*, and proceeded:—] Is that a power which is applicable to a case of this kind? There has been a series of decisions, of which *Potts* v. *Warwick and Birmingham Canal Navigation Company* (1) is one, and very many since down to and subsequently to *Gardner* v. *London, Chatham, and Dover Railway Company* (2), as to what the effect of a charge of this kind is upon an undertaking of a public nature, such as a canal or railway, and I quote from *Gardner's Case* (3) the words of Lord *Cairns* which were referred to by Mr. *Renshaw* in his argument: "When Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons. These powers must be executed, and these duties discharged, by the company. They cannot be delegated or transferred." That was the principle on which the Court acted in that case, where it refused to do more than appoint a receiver, and not a manager, at the instance of a

(1) Kay, 142. (2) Law Rep. 2 Ch. 201.
(3) Law Rep. 2 Ch. 212.

debenture-holder, saying, in short, that what the debenture gave was a charge on the undertaking; that the undertaking meant the completed work of the company when constructed, and the charge gave to the debenture-holder a right to the fruit, as Lord *Cairns* phrased it, of the fruit-bearing tree represented by the completed undertaking. Looking at the whole of this case so far as I have gone, seeing that the first Provisional Order contemplated a mortgage of the undertaking only, and that the mortgage is then made in the form of a debenture which is not to interfere with the carrying on of the business of the company, it seems to me that the principle of *Gardner* v. *London, Chatham, and Dover Railway Company* (1) applies, and that this debenture gives to the debenture-holder no more than the fruit of this waterworks undertaking, and not power to sell the undertaking. The debenture seems to me to shew on the face of it that it did not give the debenture-holder power, by selling to some other person, to put a stop to the undertaking altogether, because I cannot assume that selling would not put a stop to it. It is true that in the first Order the undertakers are treated as the two persons named or their assigns. They have assigned to the company. After the company had taken the assignment, and no doubt after the debentures were issued also, a new Order was obtained in 1885. In that Order the Defendants were described as the undertakers, but there was no mention of assigns. [His Lordship referred to the terms of the Order and continued :—] That Order practically recognised the limited company as being the persons who became entitled to all the rights under the Order of 1879. It gave to them as undertakers additional powers, so that I take it, without some authority, the company would not be at liberty to assign over those rights. It is said that this does not matter, because it could not have been intended that any rights the mortgagees might have should be taken away from them by force of the Provisional Order. But it must be remembered that the mortgagees have had the benefits of these additional powers in the conduct of the business of the company. It is very difficult for them to say that, notwithstanding those benefits which they have received, they still have the rights which existed before

(1) Law Rep. 2 Ch. 201.

KAY, J.
1889
BLAKER
v.
HERTS AND
ESSEX
WATERWORKS
COMPANY.

the Provisional Order was made. My view, however, is that they have not and never had any such right as that contended for. No case has been mentioned, and I am myself not aware of any, in which a waterworks undertaking or a gas undertaking formed under this or any similar Act has been sold by or at the suit of debenture-holders. I should certainly hesitate for the first time to make an order of that kind, and particularly in a case like this, where it seems to me, looking at the whole transaction, that a mortgage of the undertaking only was authorized by the first Provisional Order, and that the form of the debentures contemplates the carrying on of the business of the company notwithstanding the existence of the charge. In all the circumstances, therefore, I think it would not be right to make an order authorizing the selling or breaking up of this waterworks company.

The only other question is whether a manager can be appointed. The business of the company is not referred to in clause 7 of the Provisional Order of 1879, nor comprised in the mortgage; the charge was not to hinder or interfere with the business of the company, and therefore it seems to me that in this respect also the case is within the decision in *Gardner* v. *London, Chatham, and Dover Railway Company* (1). We all know very well that an Act was passed after that case authorizing the appointment of a manager. But that Act did not apply to a case like this, but only to the case of a railway company: 30 & 31 Vict. c. 127, s. 6.

[His LORDSHIP accordingly gave judgment declaring the Plaintiffs entitled to a charge upon the undertaking, directing an inquiry who were the debenture-holders and what was due to each of them, and not continuing so much of the orders of the 12th of September, 1888, and the 21st of January, 1889, as appointed a manager, but continuing the appointment of the receiver.]

Solicitors: *Renshaws*, agent for *Blaker & Son, Lewes; Cope & Co.*

(1) Law Rep. 2 Ch. 201.

C. C. M. D.

In re W. ROPER'S ESTATE. MORRELL *v.* GISSING.

CHITTY, J.
1889
March 21.

[1888 R. 1144.]

Will—Construction—Survivor.

A testator directed his personal estate to be converted and invested in Consols sufficient to provide life annuities to a specified amount for his wife and his four children, *George*, *Jane*, *William*, and *Robert*: upon the death of his wife her annuity was to be distributed among his said four children for their lives: upon "the decease of either of his said children" the testator bequeathed one-fourth of the said fund of Consols to the children or child of such deceased child absolutely, and in the event of either of his said children dying without issue he gave "the fourth part or share to which the children of such dying child would have been entitled unto the survivors of my said children in equal shares." The will contained a residuary gift. *George*, the last survivor, having died without issue:—

Held, following *Maden* v. *Taylor* (1) and *Davidson* v. *Kimpton* (2), in preference to *In re Mortimer* (3), and *Askew* v. *Askew* (4), that *George*, as the longest liver, became absolutely entitled on his death without issue to the *corpus* of his one-fourth of Consols, and consequently, that it belonged to his representatives.

ADJOURNED SUMMONS.

William Roper by his will, dated the 17th of July, 1838, after directing that the whole of his personal estate, except what he thereby specifically bequeathed, should be converted into money as soon as possible after his decease and laid out in the purchase of Consols, in the names of his executors, and also that the stock and annuities which might be standing in his name at the time of his decease in any other Government stock or security should be sold by his executors, and the produce thereof invested as soon as might be after his decease in the purchase of Consols in their names, gave and bequeathed the "annual sum of £170, part of the dividends to arise from such stock," unto his wife for her life or widowhood, "the sum of £50 per annum other part to arise from the said dividends" unto his son *George William Roper* for life, and gave in precisely similar words other annuities of £50

(1) 45 L. J. (Ch.) 569.
(2) 18 Ch. D. 213.
(3) 54 L. J. (Ch.) 414.
(4) 57 L. J. (Ch.) 629.

CHITTY, J.
1889
In re W. ROPER'S ESTATE.
MORRELL *v.* GISSING.

to his daughter *Jane Roper*, £70 to his son *William Roper*, and £50 to his son *Robert Roper*, for their respective lives. After the death or second marriage of his wife the testator distributed the said annuity of £170 as follows: "£20 per annum part thereof" to his said son *George William*, £50 per annum to his said daughter *Jane*, £50 per annum to his said son *William*, and £50 per annum to his said son *Robert* for their respective lives; the will then proceeded as follows: "And upon the decease of either of my said children I give and bequeath one-fourth part of my said capital stock in the said 3 per cent. Consolidated Annuities unto the children of him or her so dying to be paid to them in equal shares on their respectively attaining the age of twenty-one years if more than one and if only one child then to such only one . . . . And in the event of either of my said children dying without issue I give and bequeath the fourth part or share to which the children of such dying (*sic*) would have been entitled unto the survivors of my said children in equal shares and proportions." The testator gave the residue of his estate unto his said four children, their executors and administrators, as tenants in common.

The testator died in 1840, leaving his wife and his said four children surviving him; the will was proved in January, 1841, and a sufficient amount of the testator's personal estate was invested and retained in the names of the executors to answer the annuities given by the will, and the rest of his estate was distributed among his four children.

The widow died in 1842, and the amount of her annuity was duly apportioned among the testator's four children in accordance with the will.

Jane Roper married, and died on the 7th of March, 1854, leaving four children surviving her.

Robert Roper died on the 1st of June, 1878, leaving two children surviving him. *William Roper* died without issue in January, 1884, and thereupon so much of the Consols as produced his annuities of £70 and £50 was transferred to *George William Roper*.

On the 19th of May, 1888, *George William Roper* died without issue, but having made a will in favour of some of the Defen-

dants, and the question now raised was, whether the amount of Consols that produced his original annuities of £50 and £20 belonged to *George William Roper's* representatives or passed under the residuary gift in his father's will.

Maclean, Q.C., and *P. B. Abraham*, for the Plaintiffs, the executors of *George William Roper's* will:—

George William Roper being the last survivor of the four children the *corpus* of his share on his death without issue belongs to his representatives. "Survivors" here, which is equivalent to "survivor," must be read as "longest liver." The present case is exactly within the decisions of *Maden* v. *Taylor* (1) and *Davidson* v. *Kimpton* (2), which are good law, notwithstanding the criticisms passed upon them in *In re Mortimer* (3), and *Askew* v. *Askew* (4). They also referred to *In re Hutchins' Estate* (5) as supporting the contention that "survivor" was equivalent to "longest liver."

Romer, Q.C., and *J. H. Redman*, for Defendants, beneficiaries under *George William Roper's* will, supported this argument.

Whitehorne, Q.C., and *Simmonds*, for Defendants representing the residuary legatees of the original testator:—

No one, strictly speaking, "survives" this last longest liver; it is not possible to give the *corpus* of this fourth to the Plaintiffs without giving the word "survivor" a different meaning in the case of the child last dying from that which you give to it in the case of the others who predeceased him. "Survivor" here must mean the child who was living when the particular event contemplated, namely, death without issue, happens. We rely on *In re Mortimer*, and *Askew* v. *Askew*. There are also the decisions of *Re Corbett's Trusts* (6) and *Nevill* v. *Boddam* (7) in favour of this contention, and directly opposed to the construction adopted in *Maden* v. *Taylor*, a construction which, having

(1) 45 L. J. (Ch.) 569.
(2) 18 Ch. D. 213.
(3) 54 L. J. (Ch.) 414.
(4) 57 L. J. (Ch.) 629.
(5) 19 L. R. Ir. 215.
(6) Joh. 591.
(7) 28 Beav. 554.

CHITTY, J.
1889
In re W. ROPER'S ESTATE.
MORRELL *v.* GISSING.

regard to the judgments of the two later authorities, ought not to be followed. To do this is in effect to decide that a man can be his own survivor.

Methold, for the executors of the original testator, took no part in the argument.

Maclean, in reply.

CHITTY, J.:—

The question in this case is as to the meaning of the word "survivors" in a clause which I will read: "And in the event of either of my said children dying without issue I give or bequeath the fourth part or share to which the children of such dying"—the grammar is a little imperfect, but the meaning is plain—"would have been entitled unto the survivors of my said children in equal shares and proportions." There were four children of this testator, and by the will the *corpus* of this fund of Consols, which the testator had directed to be set apart to answer the annuities, is divided, as the annuities drop in after the death of each child, among his or her children if there were any, or if not, then among the "survivors." Now of the four children *Jane* died first, leaving issue; *Robert* died second, also leaving issue, and of course this clause did not operate on their shares, and half the fund, therefore, remained. Then *William* died without issue, and thereupon half the remaining half—that is one-fourth of the original fund—passed to *George William Roper* absolutely, because he survived *William*: then there was one original share remaining undisposed of, and as *George William Roper* has recently died without issue, the question is, what is to become of that one-fourth—the fourth that was primarily intended for *George William Roper's* children had he any, which, if he had none, is said to be disposed of by the clause I have read.

I have heard the usual argument in cases of this kind—it is not new to me. I am asked by way of puzzle whether a man can be said to die in his own lifetime, or whether he can be said to survive himself, and many other more or less interesting questions of the same character have been put before me; but there

are two plain decisions on this point: the one *Maden* v. *Taylor* (1), before Sir *George Jessel*, and the other *Davidson* v. *Kimpton* (2), before the present Lord Justice *Fry*, where, on words not distinguishable from the present, and on principle, those two learned Judges decided that "survivor" meant in such a case as this the "longest liver," and that the term included that meaning. These decisions, were it not for some other authorities which have been referred to, would be binding upon me, and conclusive upon this point. I myself have had this point before me before (3), and have decided it in the same way as those two learned Judges decided. Observations, however, have been made on these two decisions by other learned Judges, by Mr. Justice *Kay* in *In re Mortimer* (4), and by Mr. Justice *North* in *Askew* v. *Askew* (5); cases which are not decisive as they stand upon the point before me, but cases in which the learned Judges more or less criticised, and more or less dissented from, the principles upon which the late Master of the Rolls and Lord Justice *Fry* decided the cases I first mentioned. There does also appear to be a decision of Sir *W. Page Wood* (*Re Corbett's Trusts* (6)), which is adverse to the decisions of *Maden* v. *Taylor* and *Davidson* v. *Kimpton*, although the precise point does not appear to have been argued. There is also the case of *Nevill* v. *Boddam* (7) before Lord *Romilly*. Those cases, particularly *Re Corbett's Trusts*, do appear to be decisions in point, though I cannot find that the matter was argued; but in the cases before Sir *George Jessel* and Lord Justice *Fry* the point was carefully and elaborately argued and considered by those two learned Judges. I propose to follow, as I have already done, these decisions, which I think are right in principle. I do not propose to restate the grounds upon which Sir *George Jessel* proceeded; they will be found at length in his judgment; but I may mention a point or two. It cannot be doubted that, if there is a gift to the survivor of so many persons, the survivor of those persons takes, and it cannot be doubted on this will that *George William Roper* took his brother *William's* share when

(1) 45 L. J. (Ch.) 569.
(2) 18 Ch. D. 213.
(3) *Re Hodgson*, 11th Aug. 1887, not reported.
(4) 54 L. J. (Ch.) 414.
(5) 57 L. J. (Ch.) 629.
(6) Joh. 591.
(7) 28 Beav. 554.

CHITTY, J.
1889
In re W. ROPER'S ESTATE.
MORRELL v. GISSING.

William died without issue, and it would be most singular to attribute to the testator such an eccentricity as would give to *George William Roper*, *William's* share, and take away from *George William Roper* his own sharo; or, to put it more accurately, the share primarily intended for his children.

The adverse comments made on Sir *George Jessel's* decision in *Maden* v. *Taylor* (1), by Mr. Justice *Kay* and Mr. Justice *North* are in effect that Sir *George Jessel* attributed two meanings to the word "survivors," and upon that I am not able to agree with those learned Judges. It appears to me that "survivors of my said children" means the "longer livers," those who outlive the others; so that out of the four, when the first dies, who takes? Why the three, because they lived longer than the one who is dead. They cannot, however, take his share, or the share intended for him, unless there is some other event, viz. the death of the one who dies first without issue; but they still take it under the meaning—the fair and proper meaning—of the word "survivors," because they have outlived him. They must outlive him, and there must be also that other event, viz. that he dies without issue. They are the longer livers. So when the second one dies, the other two are the survivors of him, and they can come forward and claim his share, but claim it vainly if the event on which it is to come to them does not happen, viz. the death of the second one, also without issue. So with the third: when the third dies, as in this case, without issue, *George William Roper* is the survivor. Now, he is the absolute survivor of all, he has outlived the others. I am unable to see that the construction adopted by Sir *George Jessel* and Lord Justice *Fry* does in substance attribute two meanings to the word "survive." The way I put it is this, that it is the longest liver who takes, but the longest liver cannot take unless that event has also happened on which the will says he is to take, viz. the deaths of those who died before him without issue, and as to the share originally intended for him and his children his title as survivor does not become indefeasible until his own death without issue. I add to these remarks that the reasoning of the late Master of the Rolls appears to me to be forcible and to be good sense. Speaking for myself,

(1) 45 L. J. (Ch.) 569.

I do not look upon wills as Chinese puzzles; they no doubt do present great difficulties, but I do not feel the difficulty that other learned Judges seem to have found in the expressions of Sir *George Jessel* and Lord Justice *Fry*. I think their decisions are sensible, reasonable, and also logical, and when worked out produce the most logical conclusions which can be arrived at. I decide, therefore, not that *George William Roper* was living at his own death, not that he survived himself. but that he was the "survivor;" in other words, that he outlived his brothers and sisters, and consequently that the Plaintiffs, as his representatives, are entitled to the *corpus* of this fourth.

Solicitors: *Dubois, Reid, & Williams*; *Child & Norton.*

F. G. A. W.

In re DAWSON.
JOHNSTON *v.* HILL.

[1887 D. 840.]

CHITTY, J.
1889
April 5.

Practice—Guardian ad litem—Co-Defendants—Rules of Supreme Court, 1883, *Order* XIII., *r.* 1.

A guardian *ad litem* to a defendant may, under circumstances rendering it necessary, be appointed at the instance of a co-defendant by analogy to rule 1 of Order XIII. of the Rules of Supreme Court, 1883.

BY the judgment made in this action, dated the 18th of June, 1888, after directing payment to the trustees by the Defendants, *M. Dawson Hill, Mercy Crust,* and *David Burton,* or any of them, of the sum of £3600 advanced by *M. Dawson Hill, Thomas Crust* (*Mercy Crust's* testator), and *David Burton* to *M. Dawson Hill,* and payment by *M. Dawson Hill* and *Mercy Crust* of £350 advanced by *M. Dawson Hill* and *Thomas Crust,* an inquiry was directed whether *M. Dawson Hill* ought to indemnify *Mercy Crust* and *David Burton,* and whether *Mercy Crust* ought to indemnify *David Burton* against these payments.

After the date of the judgment, *M. Dawson Hill* became of unsound mind.

The Defendant *Mercy Crust* paid the whole of the £3950, and

CHITTY, J.
1889
In re DAWSON.
JOHNSTON *v.* HILL.

took out a summons in the action asking that, notwithstanding the inquiry directed by the judgment, *M. Dawson Hill* might be ordered to indemnify her against the payment of the £3950.

This summons was served on *M. Dawson Hill* in the same manner as a writ of summons was under Order XIII., rule 1, to be served on a person of unsound mind.

The Plaintiff, who was the mother of *M. Dawson Hill*, had refused to apply to have a guardian *ad litem* assigned to him.

George Henderson now moved *ex parte* on behalf of *Mercy Crust* that the official solicitor might be assigned guardian *ad litem* of *M. Dawson Hill.*

It appeared that the solicitors for *Mercy Crust* were, and had been since the commencement of the action, the solicitors on the record for *M. Dawson Hill.*

CHITTY, J.:—

Although Order XIII., rule 1, applies only to writs of summons I think I can in this case act by analogy to the rule, and make the order as asked for, as, if I did not do so, *Mercy Crust* will have to commence a fresh action. I accordingly make the order.

Solicitors: *Long & Gardiner.*

G. M.

In re PHILLIPS.
ROBINSON *v.* BURKE.

[1888 R. 2016.]

CHITTY, J.
1889
April 13.

Power of Appointment—Exercise by Will—Contrary Intention—Wills Act (1 *Vict. c.* 26), *s.* 27 [*Revised Ed. Statutes, vol. viii., p.* 35].

P., by a voluntary settlement, dated in 1880, directed his trustees to invest and deal with the trust premises in such manner in all respects as he should from time to time order and direct by any writing (but not by his last will, unless he should expressly refer to the trust premises), and subject to such trust to stand possessed of the funds upon trusts in favour of *R.* and her children. *P.*, by his will, dated in 1879, gave and bequeathed all his leasehold estates and personal estate and effects whatsoever and wheresoever to his executors upon trusts in favour of other persons than *R.*:—

Held, having regard to the terms of the settlement, that the power was not exercised by the will.

In re Marsh (1) distinguished.

ADJOURNED SUMMONS.

H. R. Phillips, by his will, dated the 12th of June, 1879, appointed the Defendants, *G. Allen, H. D. Dove* and *R. Bower*, executors and trustees, and after certain pecuniary and specific bequests and certain devises of real estate bequeathed all his leasehold and personal estate and effects whatsoever and wheresoever to his executors and trustees upon certain trusts thereby declared concerning the same.

By an indenture or declaration of trust dated the 8th of January, 1880, and made between the testator of the one part and the Defendants *Henry Sandford* and *John Burke* of the other part, it was declared that certain funds therein mentioned should be invested and dealt with by the Defendants, the trustees, as the testator "from time to time by any writing (but not by his last will and testament or any codicil thereto unless he shall expressly refer to the said trust fund and premises) order or direct, by which writing or writings the trusts of these presents may be absolutely revoked, annulled, altered or varied or otherwise dealt with at the free will and pleasure" of the testator, and

(1) 38 Ch. D. 630.

CHITTY, J.
1889
In re PHILLIPS ROBINSON *v.* BURKE.

that subject to the said trust the trustees were to stand possessed of the said funds upon trust for the testator for his life, and on his decease upon trusts for the benefit of the Plaintiff and her children.

By a further deed, dated the 4th of June, 1884, and indorsed on the deed of the 8th of January, 1880, additional funds were settled upon similar trusts to those declared by the deed of the 8th of January, 1880.

The testator made three codicils to his will, the last of which was dated the 18th of December, 1883, none of which, however, affected the residuary bequest contained in the will or referred to the deeds of settlement.

This action was commenced by originating summons, and the Plaintiff took out a summons asking for a declaration that the testator's will did not operate as an exercise by him of the power of appointment reserved in the deeds of settlement and for execution of the trusts of the deeds.

Romer, Q.C., and *Warrington*, for the Plaintiff:—

The point has already been decided in our favour in the case of *Charles* v. *Burke* (before Mr. Justice *Kay*, on the 12th of December, 1888), where a similar question had been raised under the will of the present testator in respect of similar settlements made by him in favour of another person, and that learned Judge held that the general bequest in the testator's will was not an exercise of the power, because the power was not a mere power of appointment but was also a power of revocation.

The executors rely on the case of *In re Marsh* (1), but we submit that that case is distinguishable from this.

Allen, for the executors, relied on *In re Marsh; Boyes* v. *Cook* (2); *In re Clark's Estate* (3).

Bramwell Davis, for the trustees of the settlement.

CHITTY, J.:—

On a question whether a power has been well exercised the first matter to be inquired into is what is the power? That can

(1) 38 Ch. D. 630. (2) 14 Ch. D. 53. (3) 14 Ch. D. 422.

only be ascertained by reading the instrument itself which confers the power. If there is a power to appoint by deed and nothing more, it is quite plain that whether it is a matter of general law, or whether it is a matter of the statutory law with reference to the 27th section of the *Wills Act*, the power is not well exercised by will. That is as simple a proposition I think as can be stated, and I think before the Court considers the operation of the 27th section upon the will which is said to execute the power the Court must carefully ascertain what the power itself is. Now this power is conferred by the settlor on himself and nothing turns upon that point. He directs in substance the trustees "to invest and deal with the trust premises in such manner in all respects as the settlor shall from time to time direct and order by any writing"—(I stay, of course, for a moment to say that if that had been all it would have applied to the execution of the power by will, but the deed goes on)—"by any writing, but not by his last will and testament or any codicil thereto unless he should expressly refer to the trust funds and premises." Therefore he cannot appoint by will unless the trust property is referred to. That is the power. Afterwards the deed goes on to say, "By which writing or writings the trusts of the indenture may be absolutely revoked, annulled, altered, varied or otherwise dealt with at the free will and pleasure" of the settlor.

Now I have ascertained the power, and it seems to me as clear as anything can be that that is not a power to appoint by will, but a power that could be exercised only by any writing other than a will, unless the will expressly refers to the trust premises. The will in question does not refer to the trust premises, and there is not shewn any intention, so far as the testator's will goes, to execute the power. But the argument is that it is statute law. I quite agree that I am not to read this instrument to find that contrary intention which is mentioned in the 27th section; because the Legislature has said look at the will: if the will is of a certain description then the will shall execute the power unless the contrary intention shall appear by the will. I cannot therefore seek for a contrary intention so as to say that the case does not fall within the 27th section except on

CHITTY, J.
1889
In re PHILLIPS.
ROBINSON *v.* BURKE.

the face of the will itself. That appears to me to be plain. The words which are supposed to bring about this most extraordinary result and work such injustice are the words "power to appoint in any manner he may think proper." But the answer is that he had not the power to appoint in any manner he might think proper. There are, no doubt, decisions on the words "in any manner," and I do not for a moment question any one of them, but I decline to say that any one of these decisions compels me to come to what I consider so absurd a conclusion as to say that this power has been exercised by the will. I have to ascertain to my satisfaction whether this power was or was not a general power by will. But it was not a power by will, for the negative is too strong in this case. It is not a power by will unless it is a will of a particular description. The question is not about the form and ceremonies attending the execution of the will, but the power is framed in such a manner, as I consider, that the 27th section does not apply to it. If I were compelled to hold the contrary the result would be shocking; because after a settlement upon an illegitimate daughter the thing is put away and forgotten, or it is not desired to be mentioned in the family, or it is not always disclosed in the family, and the settlor in such a case as this advisedly frames the power in such a way as is done here, and so limits it that except by express reference in the will the power cannot be held to have been executed.

What is said in *Jarman* on Wills (1) appears to me to be well stated as a general proposition, and it is this, "The will, if it is to exercise the power, becomes part of the instrument creating the power, and both must be read together to collect the intention truly." You must look, of course, at the power itself, and perhaps I am only repeating myself when I say that this case is decided, I think, so soon as you have really ascertained what the power itself was.

Therefore, I hold that the power is not exercised. Though the executors have done their duty as between themselves and their *cestuis que trust* in their character as trustees, they must pay the costs because they are only claiming this as part of the testator's assets when in fact it does not form part of them.

(1) 4th Ed., vol. i., p. 685.

Perhaps I ought to have said that the case is in my opinion entirely distinguishable from the case of *In re Marsh* (1), but if it is not distinguishable I should have felt myself in a little difficulty in holding that I was bound by that decision. I also find that on this will Mr. Justice *Kay* arrived at the same conclusion as I have done, and if it is considered that there is any error in the way in which I decide the case (although I am clear in my judgment that there is not) I should give a like decision taking the grounds that Mr. Justice *Kay* took and following his decision. I have not said anything to shew that I disagree with what Mr. Justice *Kay* had said to the effect that upon the true reading of this power it may be looked upon as a power of revocation first with a power to appoint afterwards.

Solicitors: *Potter, Sandford & Kilvington*; *Allen & Son.*

G. M.

(1) 38 Ch. D. 630.

NORTH, J.

1888
Dec. 3, 4.
1889
March 25.

CLARKE v. BIRLEY.

[1887 C. 1769.]

Principal and Surety—Release of Surety—Time given to Principal Debtor.

In order that the giving of time by a creditor to his principal debtor without the consent of a surety for the debt may have the effect of releasing the surety, there must be a binding contract to give time capable of being enforced, and the contract must be with the principal debtor. If the contract is made with a third party, for instance with a co-surety, the surety will not be released.

On the 4th of December, 1872, a deed was executed by a coal company of the first part; six sureties of the second part; and the company's bankers of the third part; whereby the company and the sureties jointly and severally covenanted with the bank to pay to the bank on demand the balance (not exceeding £25,000) for the time being due from the company to the bank on their current account, with interest, &c.

In January, 1876, there was about £26,000 due by the company to the bank, and one *H.* agreed to pay off £15,000 of the debt to the bank, on the terms contained in a deed dated the 11th of January, 1876, to which the bank, the company, the six sureties, and *H.* were parties. The deed contained recitals to the effect that *H.* had agreed at the request of the company to advance them £15,000, and to pay it to the bank in reduction of the company's balance, on the terms that he should have a first charge on certain deeds deposited by the company with the bank and on the property to which they related, in priority to the claim of the bank for the surplus of the balance due to them, but without any right to claim on the sureties in respect of his advance. And it was declared by the deed that, in consideration of the £15,000, the bank were to hold the documents and property in trust, in the first place, to secure the £15,000 to *H.*, and, subject thereto, in trust to secure to the bank the balance, not exceeding £10,000, for the time being due to them on their account current with the company, and that the deed of the 4th of December, 1872, and any covenant and provision therein contained for the benefit of the bank, save so far as the same bound or imposed any burden on the sureties as sureties, should enure for *H.'s* benefit, so as to be a security for the £15,000 and interest in priority to any claim of the bank; provided always, that nothing in the deed contained should operate to charge the sureties, or any of them, with the payment to *H.* of the £15,000, or any part thereof, or any interest thereon, the liability of the sureties for the payment of the £15,000 and interest being thereby expressly negatived:—

Held, that this deed did not reduce the liability of the sureties to the bank below the original limit of £25,000 as regarded any balance which might thereafter become due from the company to the bank.

On the 29th of November, 1880, the following document, addressed to

the bank, was executed by three of the six sureties and one *L.*: "In consideration of your continuing or giving an account, credit, or accommodation" with or to the company "for one year from the date hereof, we the undersigned do hereby jointly and severally guarantee to you the due payment of all moneys and liabilities which are or have been or shall from time to time be owing to or incurred by you on account of the said company, it being agreed that not more than £8000 shall be ultimately recoverable hereunder; the liability of the undersigned (three original sureties) respectively hereunder shall not exceed £2500, and the liability of *L.* hereunder shall not exceed £500; this shall be a continuing security until a notice in writing under the hand of us, or any of us, to determine the security as to the person or persons signing such notice, and as to all their future dealings, shall be given to you and to the other parties to this guarantee; this guarantee may be enforced to the full amount hereby secured notwithstanding the securities at present held by you, or any other security whatsoever which you may hold in respect of the account between you and the company; the security hereby given is in addition to the other securities held by you for the said account." This document was not executed by the bank, and neither the company nor any of the other three original sureties was a party to it:—

Held (1), that this document had not the effect of releasing the three sureties who were not parties to it; (2) that it had the effect of increasing the liability of each of the sureties who signed it in the proportion of £2500, even though the debt due by the company to the bank should not be increased beyond the limit of £25,000.

ACTION by the executor of a surety against co-sureties of his testator, claiming contribution by the Defendants in respect of a payment which had been made out of the testator's estate under a guarantee in which he had joined with the Defendants.

In the year 1872 the *New North Staffordshire Coal and Iron Company* had an account with the *Consolidated Bank* which they desired to overdraw, and they deposited with the bank certain documents as a security by way of equitable mortgage; and by a deed, dated the 4th of December, 1872, and made between the company of the first part, *Thomas Hornby Birley* (of *Harthill*), since deceased, the three Defendants *Herbert Birley, Arthur Birley,* and *Thomas Hornby Birley, William France,* since deceased, and *John Morkill,* since deceased (therein called the sureties), of the second part, and the bank of the third part, the company and the sureties jointly and severally covenanted with the bank to pay to the latter on demand the balance (not exceeding £25,000) for the time being due from the company to the bank on their current account, with interest, commission, and other lawful

NORTH, J.
1889
CLARKE
v.
BIRLEY.

charges. And it was agreed that certain documents then deposited should be a further security to the bank for such payment. And the company charged the properties to which those documents related with such payment accordingly, and agreed to execute a legal mortgage thereof when required by the bank to do so. The deed contained provisions for the reduction by the company of the balance due to the bank at certain specified dates, and for substituting any of the sureties who should pay the bank in the place of the bank as against the securities. The six sureties were all shareholders in, and some of them were directors of the company.

The company's debt was not reduced as contemplated, and at the end of 1875 there was about £26,000 due to the bank on the company's current account. The bank required some reduction to be made of this indebtedness, and a Mr. *Robert Heath* was willing to pay off £15,000 of the debt to the bank upon the terms contained in a deed dated the 11th of January, 1876, and made between the bank of the first part, the company of the second part, the six sureties of the third part, and *Heath* of the fourth part. The deed contained recitals to the effect that *Heath* had agreed at the request of the company to advance them £15,000, and pay it to the bank in reduction of the company's balance, on the terms that he should have a first charge on the deeds and documents then deposited with the bank, and the property to which they related, in priority to the claim of the bank for the surplus of their balance, but without any right to claim on the sureties in respect of such advance, and that the bank and the sureties had agreed thereto. And the deed declared that, in consideration of the £15,000 paid by *Heath* to the bank at the request of the company, and with the privity and consent of the sureties, the bank were to hold the documents and property in trust, in the first place, to secure the £15,000 to *Heath*, with interest thereon, and subject thereto in trust to secure to the bank the balance, not exceeding £10,000, for the time being due to them on their account current with the company, and that the deed of the 4th of December, 1872, and any covenant and provision therein contained for the benefit of the bank, save so far as the same bound or imposed any

burden on the sureties as sureties, should operate and enure for *Heath's* benefit, so as to be a security for the £15,000 and interest in priority to any claims of the bank. It also contained the following proviso:—

"Provided always, and it is hereby agreed and declared, that nothing in these presents shall operate in any manner to charge the sureties or any of them with the payment to the said *Robert Heath*, his executors, administrators, or assigns, of the said sum of £15,000 or any part thereof, or any interest to become due thereon, the liability of the sureties for the payment of the said sum of £15,000 and interest being hereby expressly negatived, and the concurrence of the sureties in these presents being only for the purpose of authorizing and sanctioning the postponement of the security of the bank so far as the said sum of £15,000 and interest is concerned."

After the execution of this deed the overdraft again increased, and on the 13th of July, 1880, the company still owed the bank £26,000.

By a deed of that date, made between the company of the one part and the bank of the other part, the company gave the bank security on the documents and property already charged, and on further documents then deposited and the property to which they related, for the sum of £26,000 and interest. It is unnecessary to refer further to this deed, as the sureties were not made parties to it or affected thereby, and it had no bearing upon the questions arising in this action.

On the 29th of November, 1880, a document was executed by three of the original six sureties, viz.: *Thomas Hornby Birley*, *William France*, and *John Morkill*, and a fourth person named *Robert Longden*. This document was indorsed thus:—

"29 November, 1880. Guarantee for securing the balance of the account of the *New North Staffordshire Coal and Iron Company, Limited*, to the extent of £8000 (being in addition to existing securities)."

It contained (*inter alia*) the following provisions:—

"To the *Consolidated Bank, Limited*:—

"In consideration of your continuing or giving an account,

NORTH, J
1889
CLARKE
v.
BIRLEY.

credit, dealings, or accommodation with or to the *New North Staffordshire Coal and Iron Company, Limited* (hereinafter styled the company) for one year from the date hereof, or for any other consideration hereinafter expressed, we, the undersigned *Thomas Hornby Birley, William France, John Morkill,* and *Robert Longden,* and every two or other number of us, do hereby jointly, and each of us doth hereby severally, guarantee to you the due payment and satisfaction of all moneys and liabilities which are or have been or shall from time to time be owing to or incurred by you, whether as bankers or otherwise, from or on account of the said company, with interest, commission, banking charges, law and other costs, charges, and expenses, it being agreed as follows:—

"(1.) That not more than £8000 shall be ultimately recoverable hereunder.

"(2.) That the liability of the undersigned *Thomas Hornby Birley, William France,* and *John Morkill* respectively hereunder shall not exceed £2500 each, and the liability of the said *Robert Longden* hereunder shall not exceed £500.

"(3.) This shall be a continuing security, notwithstanding any settlement of accounts or any other thing whatsoever, until a notice in writing under the hand of us or any of us to determine this security as to the person or persons signing such notice and as to all their future dealings shall be given to you and to the other parties or party (if any) to this guarantee.

"(4.) You may without our assent or knowledge give time, indulgence, or forbearance, or accept composition or make arrangement to, from, or with the said company, or any other person or persons whomsoever, for or in respect of the account between you and the said company or any item or items thereof.

"(7.) This guarantee may be enforced to the full amount hereby secured, notwithstanding the securities at present held by you, or any other security whatsoever, legal or equitable, which you may hold or be entitled to in respect of the account between you and the said company or any item or items thereof.

"(9.) The security hereby given is in addition to the other securities held by you for the said account."

The other three of the six original sureties, viz., *Thomas*

Hornby Birley (of *Harthill*), *Herbert Birley*, and *Arthur Birley*, were not parties to this document.

Shortly afterwards *Morkill* died, and on the 3rd of May, 1881, *Herbert Birley* gave a notice to the bank determining his guarantee, and requiring them to close the account and realize their securities, and on the 12th of May the bank served formal notices upon the sureties, demanding payment. After this the bank made no further advance to the company upon that account. They closed the account, and opened a new current account with the company.

On the 27th of August, 1883, *France* died. The Plaintiff was his executor, and on the 8th of March, 1884, an order was made in an action of *In re France, France* v. *Clarke*, to which the present Plaintiff was a defendant, for the administration of his estate. On the 24th of January, 1884, an order had been made for the winding-up of the company.

In the meantime the bank had realized the securities which they held, and there then remained a very large balance (far exceeding £10,000) due to them. They were advised at first that the effect of the deed of the 11th of January, 1876, was to reduce the liability of the sureties to £10,000 only, in the place of £25,000, and in the years 1884 and 1885 they received various payments from *Herbert Birley*, *Arthur Birley*, and *Thomas Hornby Birley*, and also from *Morkill's* executors and *Thomas Hornby Birley* (of *Harthill*) calculated upon that footing, the payments by *T. H. Birley* and *Morkill's* executors being also based upon their further liability under the new guarantee of the 29th of November, 1880. The bank also carried in a claim against *France's* estate in the administration action, upon the footing that the liability of the sureties under the deed of 1872 had, by the arrangement of January, 1876, been reduced to £10,000 only, but they subsequently adopted a different view, and increased their claim against *France's* estate, contending that the full liability of the sureties to the bank under the original deed continued, and that they were still liable on their covenants up to £25,000.

The claim as thus increased was opposed by the present Plaintiff, and was adjourned into Court and fully argued before Mr. Justice

NORTH, J.
1889
CLARKE v. BIRLEY.

Pearson on the 20th of April, 1885, and he then made a declaration that the claim of the bank against *France's* estate must be allowed upon the footing of the covenant by the sureties in the deed of December, 1872, being in force up to the limit of £25,000, and not of £10,000 only, and directed an account of what was due from *France's* estate to the bank having regard to this declaration. The other sureties then living were not parties to that proceeding, but they were affected by the result of it, and they desired that there should be an appeal from that decision, and by an arrangement, approved by the Judge in *France* v. *Clarke*, they were allowed (on certain terms) to appeal from the order, using for that purpose the name of the present Plaintiff. An appeal was accordingly presented by them, but it was subsequently abandoned.

The claim of the bank against *France's* estate (including some interest and costs) was satisfied by the payment to them out of that estate of sums amounting together to £12,666 9*s.* 10*d.*, being more than the aggregate of the payments made by all the other sureties put together. *Morkill's* executors recognised their liability to contribute to this amount, and paid to the Plaintiff the proportion which their testator's estate had to bear.

The Defendants to the present action were *Herbert Birley*, *Arthur Birley*, *Thomas Hornby Birley*, and *Francis Hornby Birley*, who was sued as the executor of *Thomas Hornby Birley* (of *Harthill*) deceased. The Defendants *Herbert Birley*, *Arthur Birley*, and *Thomas Hornby Birley* insisted that, according to the true construction of the instruments of 1872 and 1876, the liability of the sureties to the bank was reduced to a maximum of £10,000, and that they had satisfied all their liability on this footing. The fourth surety, *Thomas Hornby Birley* (of *Harthill*), also during his lifetime, and since his death, his executor, the Defendant *Francis Hornby Birley*, had insisted upon the same contention.

Rigby, Q.C., *Everitt*, Q.C., and *B. Eyre*, for the Plaintiff:—

It is said by the Defendants (1) that the effect of the deed of the 11th of January, 1876, was to reduce the liability of the sureties to £10,000; and, by those Defendants who were not

parties to the document of the 29th of November, 1880, (2) that the effect of that document was to release them altogether, because by it time was given to the principal debtors without their consent. Reliance is also placed on the notice given by the Defendant *Herbert Birley* to the bank on the 3rd of May, 1881, to determine the guarantee so far as he was concerned.

As to (1) the true construction of the deed of the 11th of January, 1876, is that it does not reduce the liability of the sureties. It contains no express release of the covenants of the sureties. It was necessary that they should concur in the deed in order to give priority to *Heath*. The deed altered the nature of the bank's security, for it gave *Heath* priority over them in respect of the £15,000, but it did not alter the extent of the liability of the sureties. Their immediate liability to the bank was indeed reduced by the fact that £15,000 was paid by *Heath* to the bank, and there was an express provision that the deed was not to give him any remedy against the sureties. But the liability of the sureties on their covenants was unaffected. When the debt due by the coal company to the bank afterwards increased, the liability of the sureties, which had been temporarily reduced by the payment of the £15,000, increased again. That it did so was the fault of the sureties themselves, for they could have determined their guarantee at any time by giving notice to the bank. As they did not do this, they remained liable to the bank for whatever balance might be due to them from the coal company up to the limit of the £25,000.

[NORTH, J.:—I consider myself bound by the decision of Mr. Justice *Pearson*, and I decline, therefore, to hear any further argument on this point. The decision may not be *res judicata* as regards the Defendants, but they must question its correctness elsewhere.]

The deed of the 13th of July, 1880, only gave the bank additional security; it had no effect upon the sureties. There was no agreement by the bank to give time to the coal company.

(2) As to the document of the 29th of November, 1880, the coal company were not parties to it; it was an offer made by three of the sureties which was accepted by the bank. There is neither principle nor authority for saying that a document of

NORTH, J.
1889
CLARKE
v.
BIRLEY.

this kind, to which the principal debtor is not a party, can affect the position of the sureties. No doubt, any departure from the contract between the principal debtor and the creditor will discharge the surety, if it is made without his consent—if, for instance, without his consent time is agreed to be given by the creditor to the principal debtor. But this was not an agreement by the creditor to give time to the principal debtor. The right of contribution arises between co-sureties, even if they were ignorant of each other's existence. In *Ex parte Gifford* (1) it was decided by Lord *Eldon* that the discharge of a surety by the creditor does not discharge a co-surety; for, when it is ascertained that he will have to pay more than his proper proportion of the debt, he can obtain contribution from the surety who has been released. This shews the distinction between releasing the principal debtor and releasing a surety. *Dunn* v. *Slee* (2) is to the same effect. If the creditor gives time to the principal debtor the surety will not be discharged, unless the creditor enters into an agreement with the debtor to give him time, and the rights against the surety may be reserved: *Nicholson* v. *Revill* (3); *Kearsley* v. *Cole* (4); *Webb* v. *Hewitt* (5).

As regards the holder of a bill of exchange, every party to the bill is a principal debtor, though as between themselves they are sureties. In *Frazer* v. *Jordan* (6), an action by the holder of a bill of exchange against the drawer, it was distinctly held that an agreement by the plaintiff with one *K.* (not a party to the bill) without the defendant's consent, to give time to the acceptor, in consideration that *K.* would see the bill paid, did not discharge the defendant as surety, because it was an agreement with a stranger, not with the principal debtor.

The notice of the 3rd of May, 1881, had no effect on the liability of the other sureties, and, indeed, no advances were made by the bank after that date.

[They also referred to *In re Empress Engineering Company* (7); *Ex parte Snowdon* (8); *Crears* v. *Hunter* (9)].

(1) 6 Ves. 805.
(2) Holt, N. P. 399.
(3) 4 A. & E. 675.
(4) 16 M. & W. 128.
(5) 3 K. & J. 438.
(6) 8 E. & B. 303.
(7) 16 Ch. D. 125.
(8) 17 Ch. D. 44.
(9) 19 Q. B. D. 341.

Cozens-Hardy, Q.C., and *O. Leigh Clare* (Sir *H. Davey*, Q.C., with them), for the Defendants:—

It must not be forgotten that both *France* and *Morkill* were liable to contribute to pay the debt to the bank on the footing that, by reason of the document of the 29th of November, 1880, the limit of their liability was extended to £33,000, while that of the sureties who were not parties (if they remain liable at all) does not exceed £25,000.

But the effect of that document was to discharge from all liability those of the sureties who were not parties to it. It is true the bank were not parties to the document, but they accepted it and acted on it by claiming and obtaining payment on that footing from the parties to it. The principle on which a surety is discharged by the giving of time to the principal debtor is clearly stated by Lord *Hatherley* in *Oriental Financial Corporation* v. *Overend, Gurney, & Co.* (1). He said (2): "If we look to the earlier cases, amongst which I might cite especially *Oakeley* v. *Pasheller* (3), the principle is laid down very clearly that if you agree with the principal to give him time, it is contrary to that agreement that you should sue the surety, because if you sue the surety you immediately turn him upon the principal, and therefore your act breaks the agreement into which you have entered with the principal. It is not simply neglecting to sue the principal which would have any effect upon the surety, but there must be a positive agreement with the principal that the creditor will postpone the suing of him to a subsequent period." The principle is, that although the contract is made, not with the surety, but with the principal debtor, the surety is released, because otherwise he would have a right to go against the principal, and that would be inconsistent with the contract with the principal. That principle applies here. Three of the sureties were not parties to the agreement. The bank contracted with the other three sureties that they would continue their account with the coal company for twelve months. If the bank had sued the other sureties, the immediate effect would have been to turn them upon the three sureties who were parties

(1) Law Rep. 7 Ch. 142. (2) Law Rep. 7 Ch. 150.
(3) 10 Bli. (N.S.) 548.

NORTH, J.
1889
CLARKE v. BIBLEY.

to the agreement, and this would have been contrary to the express stipulation. The sureties not parties to the agreement, if sued by the bank, could not have worked out their rights without depriving the other three sureties of the benefit of the agreement with the bank. There is no distinction in principle between this case and the case of an agreement to give time entered into with the principal debtor himself. *Frazer* v. *Jordan* (1) is not a decision that the surety is not released unless the agreement to give time is made with the principal debtor himself; that case only decides that the surety will not be discharged when the agreement to give time is made with a "stranger." In the present case *Longden* was, no doubt, a stranger, but the other sureties were not strangers. In *Dunn* v. *Slee* (2) time was given to a surety; there was no contract to give time to the principal debtor.

Everitt, in reply:—

The principle laid down by Lord *Hatherley* in *Oriental Financial Corporation* v. *Overend, Gurney & Co.* (3) is limited to the giving of time to the principal debtor, and he says that there must be a positive agreement with the principal to postpone suing him. By the word "stranger," as used in *Frazer* v. *Jordan*, is meant a person who is not the principal debtor. The question is, whether the remedies of the surety against the principal are injuriously affected? If there is no bargain with the principal debtor himself, those remedies cannot be affected: *Hulme* v. *Coles* (4).

1889. March 25. NORTH, J. (after stating the facts as above, continued):—

The first point raised on behalf of the Defendants is, that the decision of Mr. Justice *Pearson* on the construction of the documents of 1872 and 1876 was erroneous, and that they are not bound by that decision, or precluded thereby from insisting upon what they allege to be the true construction of the agreement of 1876. They may be right in this view; it may be true that,

(1) 8 E. & B. 303.
(2) Holt, N. P. 399.
(3) Law Rep. 7 Ch. 142.
(4) 2 Sim. 12.

notwithstanding their intervention, the matter is not *res judicata* so far as they are concerned. But, though they may not be bound by that decision, I am, and I so stated to counsel as soon as I found that Mr. Justice *Pearson* had formally adjudicated upon and declared the true construction of these instruments. His decision is at any rate exactly in point, and I should be bound by it, even if I dissented from it. As soon as this was clear I stopped the argument of the Plaintiff's counsel on the point, and declined to hear the Defendants' counsel upon it. If that decision can be impeached successfully, it can only be done elsewhere.

The second point raised is, that the execution of the new guarantee of the 29th of November, 1880, had the effect of releasing or discharging the old sureties who were not parties to it, because time was thereby given, without their consent, to the principal debtor. This point, however, is only open to the Defendants *Herbert Birley, Arthur Birley,* and *Francis Hornby Birley,* for the other three sureties did consent to the arrangement thereby made, as they were all parties to and executed the new guarantee. But were the three who were not parties thereby released? If they were, it was obviously contrary to the intention of the parties, for the new guarantee expressly provides that the security thereby given is in addition to the other securities held by the bank, which is inconsistent with the extinction of any of those other securities by the giving of this guarantee; and I was asked to hold that the provision that this was to be in addition to the existing securities was equivalent to saying that it was to be without prejudice to those securities, and therefore equivalent to a reservation of everything necessary to be reserved in order to maintain those securities intact. But sureties are frequently released by acts not intended to have that effect, and I am precluded from holding that the mere provision for additional security is equivalent to a reservation of rights against the sureties under other securities by the language of Lord *Cairns* in *Overend, Gurney & Co.* v. *Oriental Financial Corporation* (1).

At the present day there is no doubt as to the law with respect to the release of sureties. It is clear that, when the creditor

(1) Law Rep. 7 H. L. 348, 361.

NORTH, J.
1889
CLARKE
v.
BIRLEY.

enters into a binding contract with the principal debtor to give him time, without the assent of the sureties, and without reserving his remedy against the sureties, such giving of time discharges the sureties. As Lord *Eldon* says in *Samuell* v. *Howarth* (1): "The rule is this—that, if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety; that is, if time is given by virtue of positive contract between the creditor and the principal—not where the creditor is merely inactive. And, in the case put, the surety is held to be discharged, for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal, or not; and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract."

But, to produce this result, two things are necessary. There must be a binding contract to give time, capable of being enforced; and the contract must be with the principal debtor. If merely made with a third party it will not do, as was decided in *Frazer* v. *Jordan* (2), where in an action by the holder against the drawer of a bill of exchange it was held to be no defence to the drawer that the holder had, without the drawer's consent, made a binding contract with a third party to give time to the acceptor, in consideration of an undertaking by the third party to see the bill paid.

In order to apply these principles to the present case it is necessary now to consider the construction of the new guarantee. The first thing observable is that it is not executed by the company who are the principal debtors, nor are they expressed to be parties to it. It is merely a guarantee by the four signatories to the bank. It does not purport to be a contract with the company, and they could not have brought any action upon it. It does not purport to bind them to keep an account with the bank or anything else, and each person who signed it has power to determine it at any time on giving proper notice. Under these circumstances it is clear that there is not any binding contract with the company capable of enforcement by or against them, either in their own name or in

(1) 3 Mer. 272, 278. (2) 8 E. & B. 303.

the names of the sureties who signed it: see *In re Empress Engineering Company* (1); *Gandy* v. *Gandy* (2). Again, even as regards the persons who did sign it, there was no agreement by the bank. If *A.* accepts from *B.* a written guarantee that, in consideration of his continuing to supply *K.* with goods for one year from date, he, *B.*, will pay for them, *A.* does not thereby bind himself to supply goods, nor enter into any contract which would be broken by his refusing or discontinuing to supply them, though it may be that, if the supply was refused by *A.* within the year, the guarantee might cease to be binding upon *B.* So here, when the sureties say, "in consideration of your continuing or giving an account for a year, we will pay," this is not an agreement by the bank to continue the account for a year, though there might have been a failure of the consideration for the guarantee if the account had been finally closed within that time and no other account opened. It is obvious that there is no agreement which the bank could be compelled to perform specifically, as there is no indication that the bank may not require the account to be reduced, and no sum fixed as the minimum credit to be given. And I am satisfied that it was the continuance or giving of the account, and not an agreement to continue or give it, which was the real consideration for the guarantee. This accounts for the form of the instrument, and for the fact that its execution by the bank was not required or contemplated. And it is far more probable that it was the real intention of the parties that, if the consideration was not given, the guarantee should be at an end, than that the guarantee should continue, but the guarantors should have a right of action against the bank for breach of agreement. It was said that, as the bank had received money from the defendant *T. H. Birley*, and from *France's* estate by virtue of this guarantee, they must be in the same position as if they had signed it. That might be so if their signature had been contemplated, or was necessary to give the document its proper effect. But this is not the case. Even if they had signed it, they would not have been bound by terms which are not to be found within it.

It was further said that the three sureties who did not sign the

(1) 16 Ch. D. 125. (2) 30 Ch. D. 57.

NORTH, J.
1889
CLARKE
v.
BIRLEY.

new guarantee are prejudicially affected by it, as their rights over against their principal debtor and co-sureties are suspended for the year over which the account is to extend. But how are they prejudiced? As regards the company it is clear they are not, for there is nothing in that guarantee which could give the company a defence to any action brought against them by the bank, or to any proceeding against them by any surety requiring the company to pay off the bank and relieve the sureties from further liability. Again, if these co-sureties chose during the year to put an end to their original guarantee and pay off the debt of the bank, and then call upon their co-sureties for contribution, there is nothing to prevent them from so doing. The way it is put is, that if these three sureties paid the bank during the year, they would be entitled to call upon the bank to close the account current with the company, and transfer to them the securities which the bank held, and that the bank would be unable to do this, because they had agreed with the other sureties to keep the account open, and therefore those three sureties would be prejudiced. But to this there are several answers. In the first place, as I have already pointed out, the new guarantee does not amount to an agreement by the bank to keep the account open. In the next place, even if it did, this would not prevent the bank from closing the account, even if the doing so did give the new guarantors a right of action against the bank for breach of agreement, a matter with which the other three co-sureties have nothing to do. And there is yet another answer upon the face of the guarantee itself. Even if it be its true construction that the bank agreed to keep an account open with the company for a year, and that the company could enforce that contract against the bank (both of which assumptions I hold to be unfounded), the bank would not have committed any breach of the agreement by closing the old account upon which the six sureties were jointly liable. The guarantee does not in any view contain an agreement by the bank to keep open that account. The language (which is very loose and vague) merely runs "In consideration of your continuing or giving an account, credit, dealings, or accommodation with or to the company." Its meaning merely is, that the bank are to continue to act as

bankers of the company, and to give them banking facilities to some extent not specified. And it was entirely in accordance with the agreement I am assuming for the moment to have existed between the bank and the company, that, on the receipt of the notice from the Defendant *H. Birley*, they closed the old account current for which the six sureties were liable, and opened a new account current with the company.

Under these circumstance it is clear that the acceptance by the bank of the new guarantee did not prejudice the sureties who did not sign it, and did not, therefore, operate as a release to them. It did, indeed, enure for their benefit in one way, as it increased the amount of the security held by the bank from £25,000 to £33,000, and as (in the event) the total indebtedness of the company to the bank fell far short of £33,000, the total liability to which the sureties under the deed of 1872 have jointly to contribute falls in the same proportion below the amount for which, but for the new guarantee, they would have been liable. It is true that in some cases an alteration in the position of a surety behind his back has the effect of releasing him, even if the alteration be for his benefit; but it has never been held that the mere acceptance of additional security, unaccompanied by a contract to give further time, would produce this result, as is shewn by the observations of Lord *Cairns* to which I have already referred.

The Plaintiff, therefore, must succeed as against all the Defendants.

MINUTE OF ORDER:—(1.) Declare that *Thomas Hornby Birley* (of *Harthill*), deceased, the three Defendants *Herbert Birley*, *Arthur Birley*, and *Thomas Hornby Birley*, and *William France* and *John Morkill* respectively deceased, were, under the covenants contained in the deed of the 4th of December, 1872, jointly and severally liable to the *Consolidated Bank* for the balance (not exceeding £25,000) for the time being due and owing from the coal company to the bank on their account current with the bank as in the deed mentioned, with interest, and that they continued to be so liable, notwithstanding the provisions contained in the deed of the 11th of January, 1876, and that their liability was not by that deed reduced to £10,000 only.

(2.) Declare that the liability of *Thomas Hornby Birley* (of *Harthill*), and the Defendants *Herbert Birley* and *Arthur Birley*, as hereinbefore declared, was not released or determined by the guarantee of the 29th of November, 1880.

NORTH, J.
1889
CLARKE
v.
BIRLEY.

(3.) Declare that, as between the estate of *Thomas Hornby Birley* (of *Harthill*), the Defendants *Herbert Birley*, *Arthur Birley*, and *Thomas Hornby Birley*, the estate of *France*, the estate of *Morkill*, and *Robert Longden*, the sums payable to the bank by them in the aggregate ought to be borne by them respectively in proportion to the following sums, that is, as to the estate of *Thomas Hornby Birley* (of *Harthill*), the sum of £4166 13*s.* 4*d.*, as to the Defendant *Herbert Birley*, the sum of £4166 13*s.* 4*d.*, as to the Defendant *Arthur Birley*, the sum of £4166 13*s.* 4*d.*, as to the Defendant *Thomas Hornby Birley*, the sum of £6666 13*s.* 4*d.*, as to the estate of *William France*, the sum of £6666 13*s.* 4*d.*, as to the estate of *John Morkill*, the sum of £6666 13*s.* 4*d.*, and as to *Robert Longden* the sum of £500.

(4.) Declare that the Defendants *Herbert Birley*, *Arthur Birley* and *Thomas Hornby Birley*, and the estate of *T. H. Birley* (of *Harthill*), are respectively bound to contribute upon the footing of the preceding declarations their respective proper proportions of the amount which has been paid out of the estate of *France* in excess of his proper proportion in respect of his liability under the guarantee, with interest, having regard to the payments already made by those Defendants, and by *T. H. Birley* (of *Harthill*) respectively, in respect of such liability, and that in ascertaining such respective proper proportions any inability of any of the said persons or estates to make good wholly or in part his or its proper proportion is to be taken into account.

Account to be taken on the footing of the above declarations, and order for payment accordingly.

Defendants to pay the costs of the action down to this time. Subsequent costs reserved, with liberty to apply in Chambers as to them.

Solicitors for Plaintiff: *G. L. P. Eyre & Co.*

Solicitors for Defendants: *Clarke, Woodcock & Ryland.*

W. L. C.

In re DUNN'S TRADE-MARKS.

C. A.
1889
KAY, J.
Jan. 31.
C. A.
April 5, 6, 9

Trade-mark—Registration—Words calculated to deceive—Application of Words to a different Article—"Fruit Salt"—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 73.

E. had for many years used the words "*Fruit Salt*" as his trade-mark for an effervescing drink. *D.* applied to register the same words as part of his trade-mark for a baking powder. *E.* opposed the registration as interfering with his trade-mark and calculated to deceive the public:—

Held, by *Kay*, J., and on appeal by *Cotton*, L.J., that although *E.* had no monopoly of the use of the words "*Fruit Salt*," and although the words were descriptive and not in themselves deceptive, yet that under the circumstances they were calculated to deceive the public within the meaning of the 73rd section of the *Patents, Designs, and Trade Marks Act*, 1883, and that the trade-mark ought not to be registered.

But *held* by *Lindley* and *Fry*, L.JJ., reversing the decision of *Kay*, J., that although *D.* had adopted the words "*Fruit Salt*" on account of the popularity they had acquired through *E.'s* use of them, yet as *D.'s* trade-mark was for a totally different article, which did not interfere with *E.'s* trade, the Court ought not to refuse its registration.

ON the 1st of September, 1877, *J. C. Eno* registered the words "*Fruit Salt*" in class 3 as an old trade-mark for "proprietary medicine for human use," and on the 14th of November, 1878, he registered the same words as an old trade-mark in class 42 as a "dry preparation for making a non-intoxicating beverage."

On the 7th of May, 1886, *W. C. Dunn*, who had for some time carried on business in *Canada*, applied to register the words, "*Dunn's Fruit Salt Trade-mark Baking Powder*" as a trade-mark for baking powder: and on the 29th of June, 1887, he applied to register "*Dunn's Fruit Salt Baking Powder*" with a device representing a woman holding up a dish of cakes, as a trade-mark for baking powder: and on the 26th of July, 1887, *Dunn* issued a summons for the rectification of the register by expunging the trade-mark "*Fruit Salt*" of *J. C. Eno*.

The registration of *Dunn's* two trade-marks was opposed by *Eno* on the ground of his having himself registered the words "*Fruit Salt*," and that the use of *Dunn's* proposed trade-marks was calculated to deceive the public, and he took out two summonses for that purpose. The summons taken out by *Dunn*

C. A.
1889
In re
DUNN'S
TRADE-MARKS.

and the two summonses by *Eno* were heard before Mr. Justice *Kay*. Both parties entered into evidence in support of their cause.

On the hearing, the counsel for *Eno* stated that they were unable to prove that "*Fruit Salt*" had been used as a trade-mark before August, 1875, and therefore they felt it necessary to abandon the registration of those words. The counsel for *Dunn* also withdrew their application to register their first trade-mark. The decision of the Court was therefore only asked as to the registration of the trade-mark "*Dunn's Fruit Salt Baking Powder*" with the device of the woman with the dish of cakes.

It appeared from the evidence that "*Eno's Fruit Salt*," the precise composition of which is a secret, contained some ingredients which are properly called fruit salt, and some which are not properly so called.

Dunn in his affidavit stated as follows: "I have registered in *Canada* trade-marks in connection with my baking powder containing as an essential part thereof the words '*Fruit Salt Baking Powder*.' The baking powders which I manufacture and sell are of two kinds—one known as '*Dunn's Baking Powder*, the Cook's Best Friend;' and the other (which is the most expensive article) is called and known as '*Dunn's Fruit Salt Baking Powder*.' I gave this baking powder that name, because the salts which exist in our common fruits are the chief ingredients in its composition. The actual name '*Fruit Salt*' I adopted from *Brande's* Manual of Chemistry, 1844, where under the head of 'vegetable acids' the author describes certain salts which exist in fruits . . . *Eno's Fruit Salt* and any other effervescing draught may be used as a baking powder, but *Eno's Fruit Salt* is highly unsuitable for the purpose, because the salts are free and soluble. In a baking powder it is necessary that the salts should not be free and soluble, but the contrary, so that the gas given off may be dispersed slowly and not be wasted when mixed with the dough. *Eno's Fruit Salt* has not been registered as a baking powder, nor has it, according to the best of my knowledge, information, and belief, been sold as a baking powder . . . . I have not adopted the words '*Fruit Salt Baking Powder*' with any desire to encroach on *Eno's* trade or to obtain the benefit of his adver-

tisements, but solely because the words chosen by me form a true, lucid and descriptive title of the article manufactured by me." He stated in his cross-examination that bitartrate of potash, which is obtained from the dregs in the wine vats, was the principal ingredient in his baking powder.

It was proved that "*Eno's Fruit Salt*" was occasionally used as baking powder, though it was not suitable for that purpose.

The summons was heard before Mr. Justice *Kay* on the 31st of January, 1889.

Sir *R. Webster*, A.G., *Aston*, Q.C., and *J. Cutler*, for *Eno.*

Moulton, Q.C., and *Birrell*, for *Dunn.*

KAY, J.:—

Mr. *Dunn* is a Canadian tradesman. He has carried on business in that country for some time, and he says—I am taking his own statement—"I have manufactured in that country for some time a certain baking powder." He comes now to this country, and he intends to set up a manufactory here, and in order to prepare the way for the success which he anticipates, he seeks to have a certain trade-mark of his—not a trade-mark, as I understand, which has been used before, but a certain trade-mark which I presume he has invented for this purpose—put upon the register. Now the law as to that is so plain that I presume no one can doubt for a moment what the duty of the Comptroller would be. The duty of the Comptroller is to consider whether the trade-mark is itself, or contains as part of it anything calculated to deceive. Not only that, but anything which if used exclusively would be calculated to deceive. Those are the words of the 73rd section: "It shall not be lawful to register as part of or in combination with a trade-mark any words the exclusive use of which would by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a Court of Justice, or any scandalous design." He tells me that for ten or twelve years before he began to use the words which are now objected to—"*Fruit Salt*"—he was aware that Mr. *Eno* had used them largely in *Canada.* He tells me that he cannot say he ever

C. A.
1889
In re DUNN'S TRADE-MARKS.
Kay, J.

saw those words in that combination before he saw Mr. *Eno's* use of them; he believes not, therefore the particular combination of words, "*Fruit Salt,*" was suggested to him by Mr. *Eno's* use of them. He refers in his affidavit, and he has been pressed about it in cross-examination, to a chemical book—*Brande's* Manual of Chemistry, which is dated in 1841—he has made a mistake about the date in his affidavit where he speaks of it as 1844—and extracts have been read to me from that book, but in not one of them, nor in any other part of the book, nor in any other chemical work to which this gentleman has been able to refer, has he found this particular combination of words, "*Fruit Salt.*" All that he has found is a statement that one of the constituents of fruit is a certain chemical ingredient, "a natural salt" it is called, "which exists in our common fruits." On page 1170 it says—"This section will be devoted to the tartaric, oxalic, citric, and malic acids, which are the principal of those found ready formed in our common fruits, and are of important application in the arts and domestic economy, and to a few other acids of more rare occurrence or which, by analogy, may be ranked with the above." The passage I have read is the beginning of the chapter on vegetable acids, which does not contain those words. It says, "Tartaric acid is generally obtained from the bi-tartrate of potassa." I think the words I took down as a quotation must have been the comment of the witness—"A natural salt which exists in our common fruits"—for I do not find them in the book, but you will correct me if I am wrong. However, there is not in that book, or in any other book to which the witness can refer, the peculiar combination of words, "*Fruit Salt,*" which had been used, as he admits, for ten or twelve years before he began to employ the words in *Canada.* Now he comes to this country and asks to register a trade-mark which contains most conspicuously these words. In the dark part of the trade-mark there is his own name, "*Dunn,*" which is not nearly so legible as the words which follow—"*Fruit Salt Baking Powder.*"

Now, I can only say that anybody who had been accustomed to buy *Eno's Fruit Salt* under that name—and under that name it certainly has been very largely sold in *England*—would naturally, unless he examined very carefully that label, imagine

that this was another adaptation of *Eno's* powder, which was well-known, and that this baking powder was probably made by *Eno* too. In short, this gentleman comes to this country and finds a trade established in this country, which I need not be informed is a very extensive one, in a very common article—an ordinary effervescing powder—made in certain proportions as *Eno* makes it; and, finding that article under that name or combination of words, which, so far as he is able to inform me, was invented by *Eno* himself, and was never used in any chemical work or otherwise, as far as this evidence goes, by any human being, he chooses to adopt, as an essential part of the trade-mark which he wants the Comptroller to put upon the register, these two words—"*Fruit Salt.*" Well, I can only say, if I were the Comptroller, I should say. "Putting these two words in your trade-mark will be eminently calculated to deceive; they are words which you could not possibly have any protection for the exclusive use of." I will read only the essential words of sect. 73: "It is not lawful to register as part of a trade-mark any words the exclusive use of which would by reason of their being calculated to deceive, be deemed to be disentitled to protection." Now, how on earth can this gentleman come and say, "I should be entitled to protection for the exclusive use of the words '*Fruit Salt*'?" This seems to me a perfectly conclusive reason for not registering this trade-mark of Mr. *Dunn's*.

I observe now, as I have observed before, that the question whether the Comptroller shall, in the exercise of the discretion which the Act gives to him, register a trade-mark, is a very different question from any other questions upon a trade-mark that can be raised. He is quite within his duty, and he is quite entitled, in my opinion, if he thinks that—either because there are words in it, the exclusive use of which would be calculated to deceive or otherwise—there is a sufficient reason, to say, "No; I do not think it is proper to register this trade-mark." In my opinion this is clearly an attempt on the part of Mr. *Dunn* to obtain the benefit of Mr. *Eno's* large trade. He wants, no doubt—that is the conclusion I come to—to sell his article by inducing people to believe that it is an article, either made by the same person or made in the same way, or in some way which

C. A.
1889
In re DUNN'S TRADE-MARKS.
Kay, J.

should give it part of the reputation which Mr. *Eno* has obtained for his fruit salt; and he seeks to obtain the sanction of the Court to do that and to get the advantage of another man's trade by putting this upon the register. There are thousands—there are millions of combinations of words which are quite as good for him as those words "*Fruit Salt*"—not as good for him in the sense in which he wants to use them, because many of those millions of combinations would not interfere with the trade of another man, which is evidently what *Dunn* is wanting to do. Why, if he wants to describe the article of which his baking powder is composed, does not he take those words from that chemical book which he has consulted—"bi-tartrate of potassa"? If he had put "Bi-tartrate of Potassa Baking Powder," who would object? Nobody. But he chooses, instead of putting the chemical description of the components of his baking powder, to take the words which Mr. *Eno* has used, and obviously, I think, for an extremely improper reason. I refuse this application on the part of Mr. *Dunn* with costs.

C. A.

From this decision *Dunn* appealed. The appeal came on for hearing on the 5th of April, 1889.

Moulton, Q.C., and *Birrell*, for the Appellant:—

We do not claim any title to the exclusive use of those words; but neither can *Eno*—they are merely descriptive words and common words of the English language, and cannot form a good trade-mark, and we are at liberty to use them. Mr. Justice *Kay* did not go on sect. 72, sub-sect. 2 of the Act, but on sect. 73. This is erroneous, for the expression "calculated to deceive" in that clause refers to words calculated in themselves to deceive—not to deception being occasioned because they are like another trade-mark: *In re Horsburgh's Application* (1); *Sebastian* on Trade-marks (2); *Edwards* v. *Dennis* (3). There can be no competition in trade between *Dunn* and *Eno*. *Eno* only uses the words "*Fruit Salt*" for a saline drink, and he is only to be protected in respect of such use. *Dunn* uses them for a baking

(1) 32 W. R. 530, n. (2) Page 370.
(3) 30 Ch. D. 454.

powder, which is a totally different thing, and no one would be likely to take the one preparation in mistake for the other. The effect of refusing registration to our trade-marks would be practically to give *Eno* a monopoly of the words "*Fruit Salt*," to which he is not entitled.

Sir *R. Webster*, A.G., *Aston*, Q.C., and *J. Cutler*, for *Eno*:—

"*Fruit Salt*" is not merely a description of the ingredients of which our composition is made, but is a fancy name. No chemist would describe the ingredients by those words. The expression "*Fruit Salt*" is not in common use, and is always connected with *Eno's* preparation. But we do not object to *Dunn* describing his baking powder as being composed of fruit salt, if it be so, but to his using the words as a trade-mark. If he uses the words the *onus* is on him to shew that they will not deceive the public: *Johnston* v. *Orr Ewing* (1); *Siegert* v. *Findlater* (2). The Legislature has invested the Court in the 73rd section with special powers to prevent the public from being deceived, and it ought to regard all the circumstances of the case. The words used in the trade-mark may be merely descriptive in themselves, but may be used so as to deceive purchasers. It is proved that *Eno's Fruit Salt* is sometimes used for baking powder, and therefore *Dunn's* preparation does in fact come into competition with it.

Moulton, in reply.

COTTON, L.J.:—

This is an application, by way of appeal from Mr. Justice *Kay*, for an order that the Comptroller proceed with the registration of the mark which Mr. *Dunn* applies to have registered. That trade-mark is a label with a fancy picture with Mr. *Dunn's* name, then, in not quite as large, but in quite prominent, letters, "*Fruit Salt Baking Powder*." Mr. *Dunn* is a Canadian, and he makes this baking powder, and amongst the ingredients of it there are certain salts which can be obtained from fruit, and considerable quantities of which are obtained from fruit.

The application to register the trade-mark is opposed by

(1) 7 App. Cas. 219. (2) 7 Ch. D. 801.

C. A.
1889
In re DUNN'S TRADE-MARKS.
Cotton, L.J.

Mr. *Eno.* Mr. *Eno* has a trade-mark registered which is "*Eno's Fruit Salt,*" with certain words, "Fruit Saline," "Fruit Powder," and certain other fancy things about it, and he opposes *Dunn's* application upon the ground of the use in that prominent way by *Dunn* in this proposed trade-mark of the words "*Fruit Salt.*"

From what we know of the facts they are these:—Mr. *Dunn* has adopted this name "*Fruit Salt Baking Powder*" and put the words "*Fruit Salt*" into his label or trade-mark, and he says that he discovered it, or was led to use this name, from looking at *Brande's* Manual of Chemistry. He says that that induced him to take this name "*Fruit Salt*" as a large portion of his label, and that he therefore adopted that, as I understand him, because he found that in fact he was using salts which could be obtained from fruit. Some time before that he had well known "*Eno's Fruit Salt,*" which had been sold under that name in *Canada.* Mr. *Dunn* had seen it, but he says, "It was entirely without reference to that that I took this name of '*Fruit Salt.*'" There is this remarkable fact, that neither in the treatise which I have referred to, nor, as far as I know, in any other treatise, or in any common expression used by the trade, was the term "*Fruit Salt*" used for the purpose of designating the materials which are to be found in *Eno's Fruit Salt,* and some of which are to be found in this baking powder. Of course there are additions made to *Dunn's* composition so as to make it a baking powder, and Mr. *Dunn* satisfies himself and makes an affidavit that he was led to adopt this, and he sticks to it in cross-examination, simply by what he saw in *Brande's* Manual of Chemistry. Well, he may have persuaded himself of that, but he has not persuaded me, because "*Fruit Salt*" was not a name which was known or which was commonly used either by experts, or by persons not acquainted with chemistry in order to designate those ingredients which are to be found in "*Eno's Fruit Salt,*" and also to be found, to a certain extent, among other things, in *Dunn's Baking Powder.* To my mind Mr. Justice *Kay* arrived at the right conclusion that that was not the real object with which he took the term "*Fruit Salt,*" that being not a word which would be well descriptive, or descriptive in ordinary language, or descriptive in the language of chemists, of those

ingredients, although it is very true that they may be described as salts extracted from fruit or as fruit salt.

What, under these circumstances, ought to be done? It is not the question here as to whether we should grant an injunction, at the instance of Mr. *Eno*, to restrain Mr. *Dunn* from the use of this label when he sells his goods. That is a very different thing. The question is whether we ought now to order that this should be registered as his trade-mark. In my opinion it is the duty of those who have to attend to these matters as far as they can to prevent any intentional misleading, or any intentional attempt to pass off the goods which are registered by means of a trade-mark as the goods of some one else, or as an adaptation or development of those goods. In my opinion under sect. 73 we ought, if we see that that is the probable result, as well as the intention, to refuse to order any such registration, because the section says "It shall not be lawful to register as part of or in combination with a trade-mark any words the exclusive use of which would by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a Court of Justice, or any scandalous design." Here this does not come so much under sect. 72, because, taking the two labels together, there is a difference between them, and I do not think they would be calculated to mislead so as to enable Mr. *Dunn* to pass off his goods as the goods of Mr. *Eno*. There is this in this case, that they are not the same goods, and are not sold for the same purpose. Although Mr. *Eno's* "*Fruit Salt*" can be used for the purpose of a baking powder, yet that is not what it is sold for; but, in my opinion, having regard to sect. 73, if we find that any portion of that trade-mark which is attempted to be registered will in any way deceive, or is calculated to deceive, if the probable result will be that it will deceive the purchaser or the public, then, in my opinion, we ought to do what we can to prevent that interference with the trade of others by refusing to order the trade-mark to be registered, and that is what Mr. Justice *Kay* has done.

The conclusion arrived at by Mr. Justice *Kay* was that not only was it the intention, but that the probable result of this trade-mark, with "*Fruit Salt*" in a prominent place, would be that

C. A.
1889
In re DUNN'S TRADE-MARKS.
Cotton, L.J.

purchasers would imagine, and those who saw the advertisement would imagine, that this was another adaptation of Mr. *Eno's* invention, and I think that is the probable result as well as the intention. Mr. *Eno's* composition has got the name of "*Fruit Salt*," and was commonly called and known by that name. It is clear that these, which are the great words relied upon in Mr. *Eno's* trade-mark, are made prominent catchwords in this new mark, and in my opinion the result would be that when that was sold, although it was sold for a different purpose, for baking powder, and not for the purpose of producing an effervescing drink, or an aperient medicine, it would induce people falsely to believe that this was an adaptation of *Eno's* "*Fruit Salt*."

In my opinion, therefore, it is calculated to deceive within the meaning of the section to which I have referred, namely, the 73rd section. The Master of the Rolls said in *In re Horsburgh's Application* (1), which has been referred to, that that section must be confined to cases where the words were in themselves deceptive. I cannot agree with that. If the words having regard to the circumstances are deceptive, though they are not in themselves deceptive, and it is rather difficult to say how a word can in itself be deceptive, unless you know the facts; but if for any reason, even with reference to another trade-mark, they are deceptive, in my opinion the case comes within clause 73. Although it is different from clause 72, which points to the likeness of the two trade-marks which are registered, or proposed to be registered, yet I think this does come within sect. 73, and that it is the duty of the Court, if it is so satisfied, not to order the registration, but to prevent such a trade-mark from being registered.

Now, it has been said, and that was a strong point, that this is an attempt by Mr. *Eno* to acquire for himself a monopoly, or the sole right to use the words "*Fruit Salt*." I certainly do not intend anything of the kind. If in his description Mr. *Dunn* likes to say that one of the ingredients in his composition is this salt which can be derived from fruit, or fruit salt, he is perfectly at liberty to do so. It is said that the phrase "*Fruit Salt*" consists of two common English words, and that, therefore, Mr. *Eno* cannot have any right to take those to himself. In my

(1) 32 W. R. 530, n.

opinion he has no right to take those to himself, but in my opinion he has the right to prevent those words being used in such a way as to be deceptive in representing and inducing people to believe that his, Mr. *Dunn's* composition, not being the same composition as Mr. *Eno's*, is an adaptation of *Eno's*, which in fact it is not.

In my opinion Mr. Justice *Kay* was right, and, if it rested with me, I should simply dismiss the appeal, but I believe the other Lords Justices take some different view of the facts of the case from that which I take.

LINDLEY, L.J.:—

I am sorry to say that in this case I take a different view of the rights of the parties from that expressed by Lord Justice *Cotton.*

The view which appears to me to be correct turns really on the true construction of sect. 73, and the application of that to the facts of the case.

Before I proceed to that I will make one or two observations on the expression "*Fruit Salt.*" As I understand the evidence, that expression is traceable to Mr. *Eno's* ingenuity. It was not found in either chemical or trade-books, or in dictionaries, until he hit upon it. He has spent vast sums of money in advertising "*Eno's Fruit Salt,*" and by reason of that expenditure of money the expression "*Fruit Salt*" has become generally known. It is an expression which experience shews is a taking expression. Now one question is, what does it mean? Does it mean anything particular? If it means "*Eno's Fruit Salt,*" of course that is one thing. If it means any salt which is prepared from fruit, that is a different thing. I do not know that it has any very definite meaning. Some people might think it was salt tasting of fruit for anything I know, but it is a taking name, and I agree with Lord Justice *Cotton* in thinking that it is because it is a taking name that Mr. *Dunn* has appropriated it. I think that he has selected that name from amongst others because it was a taking name, and I think he has been attempting to get the benefit of the name, but I do not think that he has been attempting to get, and I do not think he can get, the benefit of the trade of Mr. *Eno.* It appears to me that they are two totally different things.

C. A.
1889
In re DUNN'S TRADE-MARKS.
Lindley, L.J.

Now what Mr. *Dunn's Fruit Salt Baking Powder* is made of, as we are told, is tartrate of potash and flour. Tartrate of potash is a fruit salt in one sense. It is not *Eno's Fruit Salt.* It is not a "delightful cooling aperient" such as *Eno* advertises. It does not contain *Epsom* salts, and no one buying *Dunn's Fruit Salt Baking Powder* would imagine for a moment, so far as I can think or believe, that they were getting an aperient powder such as is made and sold by Mr. *Eno.* The two things seem to me to be so unlike, and the objects to be attained so different, that I cannot bring myself to believe that anybody buying *Fruit Salt Baking Powder*, would attribute to the expression "*Fruit Salt*" the aperient quality of Mr. *Eno's* mixture.

Now, let us see how the sections apply to this state of things. Sect. 73 runs thus:—"It shall not be lawful to register as part of or in combination with a trade-mark any words the exclusive use of which would by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a Court of Justice, or any scandalous design." When you come to study that section, it appears to me that the effect of it is this, to forbid the registration of any words as part of a trade-mark, the exclusive use of which would be deemed disentitled to protection in a Court of Justice by reason of their being calculated to deceive, or otherwise. What we have got to ask ourselves in reference to that section is this: Whether we can say that the exclusive use by Mr. *Dunn* of these words "*Fruit Salt*" would be deemed disentitled to protection in a Court of Justice by reason of their being calculated to deceive. Now the proper interpretation of that section has been discussed before, and I think myself that the Master of the Rolls in *In re Horsburgh's Application* (1) put upon that section its true construction. One must not forget, in construing that section, that there is a section immediately preceding it, namely, sect. 72, which protects persons already upon the register in respect of their trade-marks. "The Comptroller shall not register with respect to the same goods or description of goods a trade-mark so nearly resembling a trade-mark already on the register with respect to such goods or description of goods as to be calculated to deceive." That

(1) 32 W. R. 530, n.

section adequately protects Mr. *Eno* himself, and of course if Mr. *Dunn* were seeking to register a trade-mark which falls within that sect. 72, he would not obtain liberty to do it. But the two trade-marks are so essentially different, that even Mr. *Eno* does not say that the trade-marks are so like one another as to enable him to keep Mr. *Dunn* off the register by means of sect. 72. He is forced back on sect. 73. If I am right in thinking that sect. 73 ought to be construed in the way in which it was construed by the late Master of the Rolls, and the way in which I think the language of the section compels us to construe it, then I think that Mr. *Dunn* is not within it. That is to say, if he desired the exclusive use of those words, "*Fruit Salt*," you cannot say that the exclusive use of those words would be deemed disentitled to protection in a Court of Justice on any ground whatever. Therefore, not giving Mr. *Dunn* credit for having taken the words "*Fruit Salt*" apart from Mr. *Eno's* use of the words,—for I think he selected them because he thought they would be useful to him, and, as I say, he has sought to obtain the benefit of the words, although not the benefit of the trade—it appears to me that he is not hit by either of those sections, and that therefore he cannot be excluded from the register.

I am quite aware that Mr. *Eno* has brought a mass of evidence to shew that "*Fruit Salt*" means "*Eno's Fruit Salt*," but I cannot overlook the fact that Mr. *Eno* has himself done that which I think he had no business whatever to do; he has procured himself to be registered in respect of the words "*Fruit Salt*" alone, and he was on the register in respect of those words for some years, and it is only when his right to those words is challenged, and he finds them untenable, that he drops them. Now what is the effect of that? The effect of that is to have given him an advantage which in point of law he was not entitled to; and he is not now entitled to avail himself of the consequences of that illegal proceeding in order to extend his monopoly. I do feel the danger which the Lord Justice does not think so much of, that if we decide this matter in favour of Mr. *Eno*, we shall be giving him that which he is not entitled to, that is to say, the exclusive right to the use of the words "*Fruit Salt*," whether in connection with baking powder, or anything

C. A.
1889
In re DUNN'S TRADE-MARKS.

else, which can be brought within the class in which Mr. *Eno* is registered.

I am therefore of opinion that this appeal ought to succeed.

FRY, L.J.:—

Whatever construction we may put on the 73rd section, whether the larger or the narrower one that has been suggested, the only question in the present case is this, whether the use of the words "*Fruit Salt*" by the Applicant, Mr. *Dunn*, is calculated to deceive. It is not suggested that that section of the statute can apply for any other reason, and therefore the fundamental question in this case, and the only one on which I shall express a judgment is this: Are those words "*Fruit Salt*" as used by Mr. *Dunn* calculated to deceive? I am of opinion that they are not. In coming to that conclusion, I have, of course, attended to the evidence which has been read to us of the impression produced by those words on different minds. Some of that evidence is, to my mind, of a very incredible description. I have also attended, as I am bound to attend, to the impression which the words produced upon my own mind, and I cannot entirely give up my own judgment with regard to the use of such words in favour of the evidence of persons who say that the words "*Fruit Salt*" have produced no meaning whatever in their minds. In the first place, the words are both common English words, and, in the next place, they are so collocated as to become descriptive words. I do not mean that they communicate any exact information, or give any definite notion, but they do convey an intelligible, if a vague notion: and my mind goes very much with what was said upon that subject by Mr. *Clayton* in one of his affidavits. He said, "Mr. *Eno's* preparation at all events contains two constituents of fruit, namely, tartaric acid and chloride of sodium. One of these, namely, chloride of sodium, may, without scientific impropriety, be called a salt of fruit, or fruit salt, and the name chosen is, I think, so far descriptive. Popular names of chemical compounds and of mechanical mixtures of chemical compounds are commonly unscientific and inaccurate, but they indicate or describe the compounds or mixtures to which they are applied. Viewed as a

descriptive title, Mr. *Eno's* term '*Fruit Salt*' used in connection with his preparation compares in my mind very favourably with other popular expressions, such as salt of lemons, salt of sorrel, salt of amber, salt of phosphorus. Long before I had an opportunity of testing Mr. *Eno's* preparation, or had any information as to its composition, I had formed a conclusion, based simply upon the name '*Fruit Salt*,' that it contained some ingredient or ingredients of fruit juice, such as tartaric acid, cream of tartar, &c." I confess that those words produced upon my mind just the impression which Mr. *Clayton* says they produced on his mind prior to any analysis, namely, that they suggested that the preparation which Mr. *Eno* sold contained some ingredients derived from fruits.

The words are applied by Mr. *Eno* and by Mr. *Dunn* to essentially different things. Mr. *Eno's* preparation is described and registered under the head of "Proprietary Medicines for the use of Man," and it is described by him as a slightly aperient effervescing drink. It may be used therefore for the purposes of refreshment or for the purposes of medicine; but, as I should think, neither in the scientific nor in the popular mind, can it have any connection with a baking powder. Mr. *Dunn's*, on the other hand, is a baking powder. So far as I can form any conception of the minds of such persons, persons who buy effervescing drinks and baking powders are not likely to mistake the one for the other. I do not suppose a cook ever buys an effervescing drink with a view of turning it into a baking powder; nor do I suppose that a person buying a baking powder is in the habit of using it as an aperient drink. Therefore they seem to me to deal with essentially different things. I am not speaking of their chemical constituents, but I am speaking of them as articles of commerce and of ordinary use. It is quite true that there is some evidence to shew that "*Eno's Fruit Salt*" may be used as a baking powder. There is one accountant and one accountant's wife who tried it; there is one draper who has tried it; and there is a colonial archdeacon who has tried it, apparently under stress of difficulty for food. But what is remarkable is this: that the archdeacon who tried it in 1877 and 1880 was pleased with it and communicated his discovery to Mr. *Eno*. But Mr. *Eno*, evidently knowing that

C. A.
1889
In re DUNN'S TRADE-MARKS.
Fry, L.J.

the two things were not likely to be sold the one for the other, never availed himself of the suggestion, and never advertised it or sold it as a baking powder. That to my mind very strongly goes to shew that although the experiments which I take it have been made since the litigation (with the exception of the archdeacon's,) may be successful to a certain extent, the two things are not likely to be sold the one for the other. If Mr. *Eno's* cannot be used as a baking powder, neither can *Dunn's Baking Powder* be used as an effervescing draught, nor as an aperient medicine. It does not contain the particular constituents of Mr. *Eno's* which give it the medicinal effect, and it contains a quantity of rice flour, or some matter of that description, which prevents its being used with any propriety or success as an effervescing draught. The two things, therefore, I repeat are entirely the one outside the other and separate.

There is, therefore, very little chance, it seems to me, of deception. It is suggested—and as I understand that is the view taken by Lord Justice *Cotton*—that the words "*Fruit Salt*" upon Mr. *Dunn's* label indicate that Mr. *Dunn* has used Mr. *Eno's* preparation in the making of his baking powder. Perhaps I am proceeding upon the impression produced on my own mind, but certainly it would never have occurred to me, and certainly after it has been suggested it does not occur to me as a probable conclusion, that an effervescing and aperient powder could be used to make a baking powder, and I cannot come to the conclusion that that suggestion is a likely one. Therefore the effect produced upon my mind by the two statements is this: Mr. *Eno* seems to me to say: "I have an effervescing and medicinal powder which will produce a drink, and that powder contains certain ingredients derived from fruits." Mr. *Dunn* says: "I have a baking powder which contains ingredients produced from fruits." Both those statements, as far as I can tell, are true, and I cannot see that Mr. *Dunn* makes any suggestion which to my mind is false. I believe that Mr. *Dunn* is trying to avail himself of the popularity which has been acquired by the words "*Fruit Salt*" as a compendious compound word expressing ingredients derived from fruit, yet I think that he is endeavouring to apply that to a totally different substance. Although he is trying to get the benefit of a popular expression, he is not desiring to

compete in any way with Mr. *Eno's* trade, and is not suggesting anything which is in itself false or deceptive.

It seems to me that Mr. *Dunn's* conduct is much more like that of the tradesmen who have invented the "Brougham" carriage and the "Gladstone" bag, than it is like the tradesman who is endeavouring to deprive his competitor of his legitimate trade by taking some name which the first tradesman has invented.

It is said that the words "*Fruit Salt*" have never been used in collocation except by Mr. *Eno.* Be it so. It seems to me, I confess, to be immaterial; because I again ask myself whether, if that be so, there is any deception produced? I cannot find it. I think they suggest ingredients derived from fruits. That is true of *Dunn's Baking Powder,* and therefore I come back again to the answer that I cannot find the point of deception.

Then there is another observation which I desire to make. The statute has indicated fancy words as the subjects of exclusive user. They may constitute a trade-mark, and so in that sense they become, in an improper sense, private property. The mention of fancy words indicates I think the mind of the Legislature that words which are not fancy words—descriptive words—shall generally be left in common use. I cannot help regarding Mr. *Eno's* attempt as an instance of that perpetual struggle which it seems to me is going on, to enclose and to appropriate as private property certain little strips of the great open common of the English language. That is a kind of trespass against which I think the Courts ought to set their faces. I think that grave consequences of an injurious kind would follow if we were to yield to the suggestion of the Respondent. I think, therefore, that the appeal should succeed.

LINDLEY, L.J.:—

As regards costs we think that the Appellant ought to have the costs of the appeal, and no costs on either side of the application below.

Solicitors: *Garrard, James & Wolfe; Radford & Frankland.*

M. W.

C. A.
1889
NORTH, J.
Feb. 1.
C. A.
May 3.

HANCOCK *v.* SMITH.

[1887 H. 3177.]

Agent—Banking Account—Appropriation of Payments—Rule in Clayton's Case.

A judgment creditor of a stockbroker obtained a garnishee order on a balance at a bank standing to the credit of the broker. All moneys in the bank to the broker's credit were moneys received for clients. Since money of a client had been paid in, drawings out in excess of the then balance had been made. And so in the case of another client. Except those two there was no client who claimed any part of the fund:—

Held, by *North*, J., that, since according to *In re Hallett's Estate* (1) the rule in *Clayton's Case* (2) applies as between *cestuis que trust*, the clients had not made out that any part of the balance belonged to them, and that it must be paid to the judgment creditor:—

Held, on appeal, that as no part of the moneys in the bank was the debtor's own, the judgment creditor had no right against the balance; that although the rule in *Clayton's Case* was applicable as between *cestuis que trust* it could not be applied unless there was a conflict between them in consequence of there not being enough to pay them all, and that here, it being clearly shewn that the balance in hand was equal in amount to the sums remaining due from the broker to these two clients in respect of moneys of theirs paid into the account, and that there was no claim on behalf of any other client, the money belonged to these two clients.

THE Plaintiff on the 17th of January, 1888, obtained judgment in this action against the Defendant for £650 and costs. On the 5th of November, 1888, the Plaintiff obtained a garnishee order *nisi* attaching a balance of £301 1*s.* 3*d.* then standing to the credit of the Defendant at the *Lothbury Branch* of the *London and Westminster Bank*. The Defendant was a stockbroker; he had been a member of the *Stock Exchange* till December, 1886, and since that time had continued to act as a stockbroker for his former clients by the help of a broker who was a member of the *Stock Exchange*. He deposed that all moneys paid into his account at the *London and Westminster Bank* were moneys received by him on behalf of clients.

On the 27th of November, 1888, the Defendants' solicitor gave notice to the bank that the balance of £301 1*s.* 3*d.* belonged to

(1) 13 Ch. D. 696. (2) 1 Mer. 572.

the following persons in the following proportions; Mrs. *Eliza Jones*, £221 3*s*., *Edmund Shaw*, £60, Miss *Palmer*, £14 12*s*. 6*d*., Miss *Abrey*, £3 8*s*. 6*d*. These persons were summoned to appear under Order XLV., rule 5. The sums claimed by them did not quite make up £301 1*s*. 3*d*. The Chief Clerk considered that Mrs. *Jones* and Miss *Abrey* had made out their claims, but that *Shaw* and Miss *Palmer* had not. These latter claims were adjourned to be heard by the Judge in person, and Mr. Justice *North* in Chambers, on the 14th of January, 1889, disallowed them.

The claims stood on the same footing, and it will be enough to state the particulars as to *Shaw*. On the 15th of October, 1888, the Defendant had paid into his account £409 15*s*., received by him as broker for *Shaw*. He paid in no other sum on that day, but drew out sums amounting to £554 16*s*. 2*d*., and at the close of the day the balance to the Defendant's credit was £522 13*s*. 6*d*. On the 30th of October the Defendant drew out to complete a purchase for *Shaw*, £340, and had previously drawn out on his behalf £9 15*s*., thus leaving £60 due from him to *Shaw*.

After the 15th of October and before the cheque for £340 was presented, sums amounting to £1073 18*s*. 9*d*. had been paid in, and sums amounting to £1187 2*s*. 1*d*. drawn out, so that if the rule in *Clayton's Case* (1) applied there was no money of *Shaw's* left in the bank.

Shaw and Miss *Palmer* moved to discharge the order of the 14th of January. The motion was heard before Mr. Justice *North* on the 1st of February, 1889.

Townsend, for the Claimants:—

The judgment creditor can stand only in the shoes of the debtor, he takes subject to all trusts and equities affecting the garnished fund: *Badeley* v. *Consolidated Bank* (2); *Ex parte Whitehouse* (3). This money was trust money belonging to the broker's clients, among the number of whom the claimants were: *Ex parte Cooke* (4).

[NORTH, J.:—Does not the case of *In re Hallett's Estate* (5)

(1) 1 Mer. 572.
(2) 38 Ch. D. 238.
(3) 32 Ch. D. 512.
(4) 4 Ch. D. 123.
(5) 13 Ch. D. 696.

C. A.
1889
HANCOCK
v.
SMITH.

decide that the payments out are to be appropriated to the earlier payments in?]

That is so as between different persons whose trust money it is. But the Court of Appeal in that case decided that as between the beneficaries and the trustee, to whose account the trust money has been paid in, the beneficiary is entitled. Whosesoever money this is, it does not belong to this debtor, and as against a person standing in his place it belongs to the beneficiaries. No one else having claimed it as trust money the present claimants are entitled.

R. F. Norton, for the Creditor:—

The decision of *In re Hallett's Estate* (1), in the Court of Appeal, was that where there were trust moneys mixed with the private moneys of the trustee in a banking account the drawings out were to be appropriated to the trustee's own money, but Mr. Justice *Fry* in the Court below decided that as between the different *cestuis que trust* the drawings out were to be appropriated to the funds paid in in order of dates; and that was not interfered with by the Court of Appeal. In this case none of the funds belonged to the broker, therefore the drawings out are appropriated to the older payments in, and the claimants' money is gone; there is nothing they can follow.

Townsend, in reply.

NORTH, J. (after stating the facts, continued):—

Applying the doctrine of appropriation of payments out to the payments in in order of date, the sums paid in representing the two claimants' money had been more than paid out, and no part of the balance left in the bank consisted of any part of either of the two sums claimed. But, say the claimants, that does not preclude them, because as between themselves and the bank they are entitled to everything left in. No doubt they are entitled to say that all payments out of the bank, on the broker's private account, are made out of the moneys of the broker's own in the bank. But the broker has sworn that he had no private moneys

(1) 13 Ch. D. 696.

in the bank, and the whole of the moneys paid into the account represented and consisted of moneys received for his clients. The result is that all the moneys paid in were trust moneys, and as between the persons to whom those moneys belonged the payments out are to be taken to be set off against the moneys first paid in in order of date. That was settled by Lord Justice *Fry* in the case of *In re Hallett's Estate* (1); and his decision on that point was not questioned in the Court of Appeal. There the rule, as stated in the head-note, is "as between two *cestuis que trust* whose money the trustee has paid into his own account at his bankers, the rule in *Clayton's Case* (2) applies, so that the first sum paid in will be held to have been first drawn out." I can see other difficulties in the way of the Claimants; but it seems to me that the principle laid down by Lord Justice *Fry* is a fatal difficulty, and it is unnecessary to go into other matters. The motion must be refused.

D. P.

Pursuant to this decision, out of the balance in hand, the claims of Mrs. *Jones* and Miss *Abrey* were paid, and the residue was paid over to the Plaintiff.

On the 8th of February, 1889, *Shaw* gave notice of appeal against the orders of the 14th of January, 1889, and the 1st of February, 1889. The appeal was heard on the 3rd of May, 1889.

Townsend, and *Fossett Lock*, for the appeal:—

We contend that the rule in *Clayton's Case*, does not apply here, there being no question between *Smith's* clients *inter se*. The rule as to following money is not confined to trust money, but extends to money received by a broker: *Ex parte Cooke* (3). Our case is covered by *In re Hallett's Estate*. None of the money ever belonged to *Smith*.

[THE COURT then called on the Plaintiff to shew how he could support the decision in his favour.]

R. F. Norton, for the Plaintiff:—

[LORD HALSBURY, L.C.:—Is it not necessary for you to shew that this balance belonged to *Smith*?]

(1) 13 Ch. D. 696. (2) 1 Mer. 572. (3) 4 Ch. D. 123.

C. A.
1889
HANCOCK
v.
SMITH.

I submit not; the Claimants come to take it out of his hands, and must prove it to be theirs. They must shew that their money remains in the bank, but we shew that their money had all been paid out.

[FRY, L.J.:—Yes; as between them and any other client of *Smith's* whose money had been paid in and not fully repaid, but not as between them and *Smith.*]

We submit that the onus of proof is on the Claimants; unless they prove their title to the money, they have no right to say that I shall not attach it. If I take in execution furniture in the possession of my debtor, I can hold it unless a claimant proves that it is his. *Ex parte Cooke* (1) applies only to a broker, and *Smith* not being a member of the *Stock Exchange* cannot be considered a broker.

[FRY, L.J.:—He received the money as confidential agent. Can it make any difference whether he was duly qualified to act as broker?]

The money in the bank is not the same as what *Shaw* paid in.

LORD HALSBURY, L.C.:—

We are all clearly of opinion that the Plaintiff is not entitled to attach this balance, but we are not quite satisfied that we can make an order in Mr. *Shaw's* favour. It does not appear to be distinctly made out that there is no other client of *Smith* who can make a claim.

[The Defendant, who was in Court, was then called and orally examined. He gave clear evidence to the effect that all the moneys which had been paid into the account were moneys of his clients, and that he had paid all the moneys received on behalf of his clients to or for the purposes of the clients on whose behalf the same respectively had been received, except as regarded the four Claimants, to whom there remained due the above-mentioned sums, making together £299 4*s.*, the trifling excess being accounted for by a number of small transfer fees which he had paid for his clients without drawing them out of the bank.]

(1) 4 Ch. D. 123.

LORD HALSBURY, L.C.:—

I am of opinion that the orders under appeal cannot be supported. I do not think that the case raises the question which Mr. Justice *North* seems to have considered it to raise, viz. that of appropriation of payments. The rule in *Clayton's Case* (1) is a very sound rule in cases such as that in which it was first applied, but here the circumstances are entirely different. The whole fund here consists of money not borrowed by the Defendant from his clients, but received by him as agent for them, and therefore for the present purpose may be treated as trust money. Now as between *cestuis que trust* the rule is applicable, but it cannot be applied here, because no question arises between the different *cestuis que trust.* The question arises between them and a person who claims under a judgment against their trustee. Now an execution can only take effect on property which the debtor has a right to dispose of for his own purposes. The balance here in question was not the debtor's own money, he had no right to deal with it as his own, and his execution creditor has no claim upon it.

The only doubt I have felt was whether we could order payment to the Claimants, but on the evidence now before us I think that we can do so without any risk of doing injustice to any person not before us.

COTTON, L.J.:—

An execution creditor can only lay hold of what is the property of his debtor, and the evidence shews clearly that this money was paid in under such circumstances that no part of it is the debtor's own. The rule in *Clayton's Case* would apply as between the *cestuis que trust* if there was not enough to pay them all. Here there is no conflict between them, for the evidence shews that there is no client of the Defendant who can claim an interest except these four persons, and there is money in hand to pay them, so the rule in *Clayton's Case* does not apply. It was said that the money to be paid out is not the same money that was paid in, and that therefore the Claimants cannot follow it, but no

(1) 1 Mer. 572.

C. A.
1889
HANCOCK
v.
SMITH.
Cotton, L.J.

one ever does receive out of a bank the same sovereigns that he paid in. If a trustee has money of his own mixed with trust money in the same account, all his drawings out for his own purposes must be attributed to his own money, and he cannot claim to apply the rule in *Clayton's Case* (1) for his own benefit as against the *cestuis que trust*, nor can his execution creditor do so, and still less in a case where no money of the debtor's own has ever gone into the account.

FRY, L.J.:—

I am of the same opinion. An execution creditor can only take subject to all equities. The Plaintiff therefore stands in the shoes of *Smith*, and the case is as between *Smith* and the persons whose moneys he had in his hands. *Smith* could not set up the rule in *Clayton's Case*, and say that this money was his: so neither can the Plaintiff. I think that this case is decided by *In re Hallett's Estate* (2), not by that branch of the case on which Mr. Justice *North* relied, but by the other branch.

Solicitors: *G. Presswell*; *R. Chapman.*

H. C. J.

C. A.
1889
March 27, 28;
April 1;
May 9.

BAINBRIDGE *v.* SMITH.

[1889 B. 425.]

Company—Director's Qualification—Shares held "in his own right."

By a contract between the vendors of a brewery and a trustee for a limited company which was to be formed for the purchase and carrying on of the brewery, it was agreed, among other things, that *B.*, one of the vendors, should be a managing director for a specified time, and that on his retirement or death his son, the Plaintiff, should be managing director for a term therein mentioned, and that *B.* should provide a qualification for his son as managing director. By the articles of association, which adopted the contract, it was provided that a director should vacate his office if he did not acquire a qualification within a month of his appointment or election, and that the qualification of a managing director should be the holding in his own right shares of the nominal value of £25,000. *B.* provided for

(1) 1 Mer. 572. (2) 13 Ch. D. 696.

the Plaintiff shares to the amount of £5000, and died in August, 1888. The Plaintiff, who was one of his executors, and his co-executors in October, 1888, transferred shares to the amount of £20,000 into the Plaintiff's name to complete his qualification as a managing director; but the estate had not been administered, and there was no evidence under what circumstances the shares were transferred to him or whether he was beneficially entitled to them. The board of directors refused to recognise the Plaintiff as a director on the ground that he had not sufficient qualification, and he brought an action to restrain them from excluding him, and moved for an interim injunction:—

Held—(1) that on the construction of the articles the provision that the office of a director should be vacated if he did not acquire a qualification within a month did not apply to those who were appointed managing directors under the contract; (2) that in the absence of evidence as to the beneficial interest in the shares transferred to the Plaintiff the Court could not decide whether he was the holder of the shares "in his own right" within the meaning of the articles, until the estate had been administered. Afterwards, an extraordinary meeting of the shareholders having, at the instance of the Court, been held and a resolution having been passed that even if the Plaintiff was duly qualified they did not desire him to act as a managing director, the Court declined to interfere with the decision of the shareholders, and refused the injunction.

Pulbrook v. *Richmond Consolidated Mining Company* (1) considered; and the observations of *Jessel*, M.R., as to the meaning to be attached to shares held by a shareholder "in his own right" questioned by *Cotton*, L.J.

Per Cotton, L.J.:—The meaning of a shareholder holding shares "in his own right" is that he must not only have the legal right to deal with them, but must have the beneficial ownership of them; although such ownership may be incumbered.

Per Lindley, L.J.:—The expression has gained a practical conventional meaning, namely, that the shareholder holds them in such a way that the company may safely deal with them as his shares.

THIS action was brought by *Herbert William Bainbridge* against five directors of a joint stock company registered as *Henry Mitchell & Co., Limited*, for specific performance of an agreement dated the 25th of January, 1888, and for an injunction to restrain the Defendants from excluding the Plaintiff from acting as managing director of the company.

The above-mentioned agreement was made between *Henry Mitchell* and *Herbert Glendenning Bainbridge*, therein called the vendors, of the first part; *Henry Mitchell* the younger of the second part; *John Edwin Mitchell* of the third part; the Plaintiff, *Herbert William Bainbridge*, of the fourth part; and *J. E. Chambers*,

(1) 9 Ch. D. 610.

C. A.
1889
BAINBRIDGE
v.
SMITH.

of the fifth part, and thereby the vendors agreed to sell a brewery called the *Cape Hill Brewery*, in the county of *Stafford*, to the company which was to be formed for working the brewery under the name of *Henry Mitchell & Co., Limited*, for the consideration and upon the terms therein mentioned. The agreement contained a clause providing that the said *Henry Mitchell* should act as a managing director of the company for at least three years from the date of its incorporation, and upon his retirement at the end of that time, or at any subsequent time before the expiration of ten years from the date of the incorporation of the company, he should accept a seat on the board as an ordinary director for the remainder of the period of ten years; and that upon his retirement or death *John Edwin Mitchell* should succeed as a managing director for the then unexpired period of ten years. Also that the said *Herbert Glendenning Bainbridge* should act as a managing director for at least five years from the date of the incorporation of the company, and upon his retirement at the end of that time, or at any subsequent time, he should accept a seat on the board as an ordinary director for the above-mentioned period of ten years; and that upon the retirement of *Herbert Glendenning Bainbridge*, or in case of his death previously to his retirement, the Plaintiff *H. W. Bainbridge* should succeed him and act as a managing director for the unexpired period of the said term of ten years. It was also agreed that the said *Henry Mitchell* the younger should act as a managing director for the full period of ten years. The company was to pay each of the managing directors a salary of £3000 a year; and it was agreed that *Henry Mitchell* and *Herbert Glendenning Bainbridge* should provide their respective sons with the necessary qualifications for a managing director.

The company was incorporated on the 26th of January, 1888, the capital being divided into 45,000 shares of £10 each. The agreement of the 25th of January, 1888, was adopted by the articles of association. The following articles were commented on in the course of the argument:—

Art. 28 recognised the right of the executors or administrators of a deceased shareholder to transfer his shares.

Art. 29 gave the same power to the guardians of infants and the committees of lunatics.

Art. 85. The number of directors shall be not less than three nor more than seven, including managing directors.

Art. 88. The qualification of every director shall be the holding in his own right of shares or stock of the company of the nominal value of £1000.

Art. 91. The office of a director shall be vacated (among other things):

(*d*) If he cease to hold the required amount of shares or stock to qualify him for the office, or do not acquire the same within one month after election or appointment.

The other grounds for vacating the office of a director were:—if he should accept any other office in the company, or become bankrupt or insolvent; or become lunatic, or participate in any contract with or work done for the company; or absent himself from the meetings of the directors for a period of three calendar months, or take part in any business similar to that carried on by the company within fifty miles from the office of the company.

Art. 93 provided for the retirement of one-third of the directors each year by rotation.

Art. 97. The company may by extraordinary resolution remove any director (other than a managing director) before the expiration of his period of office and appoint another qualified member in his stead.

Art. 100. The said *Henry Mitchell* the elder, *Glendenning Bainbridge* and *Henry Mitchell* the younger, shall accept the office and act as managing directors of the company for the term of ten years from its incorporation: Provided that in case the said *H. Mitchell* the elder shall be desirous of retiring from the office of a managing director after the expiration of three years from the incorporation of the company, or in case of his death, his son *J. E. Mitchell* shall act as managing director in his stead for the remainder of the said period of ten years; and in case the said *H. G. Bainbridge* shall be desirous of retiring from the office of managing director after the expiration of five years, or in case of his death, his said son *H. W. Bainbridge* (the Plaintiff), shall serve and act as a managing director in his stead for the remainder of the said term of ten years . . .

Art. 101. The qualification of any managing director, whether

C. A.
1889
BAINBRIDGE
v.
SMITH.

original or substituted, during the said period of ten years shall be the holding in his own right of shares or stock of the company of the nominal value of £25,000.

Art. 102. A managing director shall not while he continues to hold that office be subject to retirement by rotation, and he shall not be taken into account in determining the rotation or retirement of directors; but he shall be subject to removal as the other directors of the company if he cease to hold the necessary qualification of a managing director, and also for all the causes for which an ordinary director may be removed.

Herbert G. Bainbridge died on the 29th of August, 1888, having before his death transferred 500 shares of £10 each into the name of his son, the Plaintiff, and the transfer was duly registered. He left a will, of which the Plaintiff was one of the executors. The will was proved on the 25th of October, 1888, and on the 27th of October the executors transferred 2000 shares of £10 each into the name of the Plaintiff to complete his qualification as a managing director.

On the 9th of November, 1888, the secretary of the company wrote to the Plaintiff stating that the directors had passed a resolution that in consequence of the Plaintiff not having qualified as a managing director within the period required by the articles of association the directors did not recognise him as a managing director of the company.

The Plaintiff attended at the next meeting of the directors, but they refused to admit him, and passed a resolution declining to allow him to attend the meeting.

The Plaintiff commenced this action on the 30th of January, 1889, and then gave notice of motion for an interim injunction to restrain the directors from excluding him from the office of managing director.

The motion was heard before Mr. Justice *Stirling* on the 1st of March, 1889, who granted the injunction asked, and the Defendants appealed from this order.

The appeal came on to be heard on the 27th of March, 1889.

Rigby, Q.C., and *Chadwyck Healey*, for the Appellants:—

The material clauses to be considered in the articles are 91,

97, 100, 101, 102. We accept the ruling of Mr. Justice *Stirling* that "subject to removal" refers to the clause as to vacating the office. The holding £1000 in shares is a necessary qualification for holding the office of a director, although it is plain from art. 91 (*d*), that it is not a condition precedent to assuming the office. But Mr. Justice *Stirling* held that the office was not vacated by the Plaintiff's not acquiring the qualification within a month. He is a director, therefore art. 91 applies to him, and under 91 (*d*) his office is vacated. He must be taken to have been "appointed" a director, for otherwise he has no right to be one; he could not compel the company to appoint him. The qualification, then, must be acquired within a month from the father's death. Shares have been transferred into his name, but his father's estate has not been wound up, and he does not hold them "in his own right:" *Pulbrook* v. *Richmond Consolidated Mining Company* (1) is distinguishable. *Pulbrook* there was on the register, and held the shares in his own right though he had mortgaged them.

[They also referred to *Childers* v. *Childers* (2).]

Buckley, Q.C., and *Farwell*, for the Plaintiff:—

Art. 91 is not applicable to the Plaintiff. He became a managing director not by appointment, but by succession to his father, under the terms of the original contract. There was no election or appointment within the meaning of the articles, therefore it is sufficient if he obtained the qualification within a reasonable time of his succeeding to the office. This he did, for he obtained the shares directly after the will had been admitted to probate. Art. 91 only refers to ordinary directors: they are to vacate their offices *ipso facto* in any of the cases mentioned in the articles: but a managing director can only be removed by a vote of the company, as pointed out in art. 102.

The Plaintiff holds the shares "in his own right" within the meaning of art. 100. *Pulbrook* v. *Richmond Consolidated Mining Company* is decisive on this point. The meaning of the clause is, that the shareholder must have the absolute right to deal with the shares, and the company is not to be affected with any trust.

(1) 9 Ch. D. 610. (2) 1 De G. & J. 482.

C. A.
1889
BAINBRIDGE
v.
SMITH.

In this case the Plaintiff's father had bound himself to transfer the shares to the Plaintiff, and the executors had full right to transfer them to him, and he holds them free from any trust.

Rigby, in reply :—

Until the testator's estate is wound up it is impossible to know whether the Plaintiff has at the present time a qualification. He can only hold the shares subject to the rights of his father's creditors. And supposing that it turns out that he has a good qualification, the shareholders ought not to be bound by the interference of the Court to accept the Plaintiff as a managing director if they should desire to remove him. Such an interference would be contrary to the practice of the Courts and ruinous to the company.

COTTON, L.J. :—

This is an appeal from a decision of Mr. Justice *Stirling* granting an injunction to restrain the Defendants from preventing the Plaintiff from acting as a managing director of a company called *Henry Mitchell & Co., Limited.* The Defendants are the board, consisting of the ordinary directors and the managing directors of the company. The Plaintiff claims to be one of the managing directors, and there is a contest as to whether he is entitled to be considered as a managing director.

The company was formed in consequence of a contract that was entered into in January, 1888. By that contract the two principal partners Mr. *Mitchell* the elder and Mr. *Bainbridge* the elder, and one of the sons of Mr. *Mitchell* were to be the managing directors. Then in the event of either of the fathers dying they were to be succeeded by the sons. Mr. *Bainbridge* died shortly after the company was formed, and the agreement was that on his death the Plaintiff should be one of the managing directors for the remainder of a term of ten years for which his father was to have held that post. There was a provision that *Henry Mitchell* the elder, and *Herbert Glendenning Bainbridge*, the father of the Plaintiff, should provide their respective sons with the necessary qualification for a managing director. There was a memorandum and articles which were annexed to

the agreement, and of course we have to turn to the articles for the purpose of seeing whether the Plaintiff is entitled to be considered as a managing director. The articles on which the case turns are those comprised between art. 85 and art. 103. Those articles are divided into two parts. They are not very happily framed. The first portion, art. 85 to art. 99, refers to directors, and those from art. 100 to art. 103 refer to managing directors. What the case principally turns upon is art. 101, which is this: "The qualification of every managing director, whether original or substituted, during the said period of ten years, shall be the holding in his own right of shares or stock of the company of the nominal value of £25,000." The Plaintiff during the lifetime of his father had shares to the amount of £5000 put into his name, which was not the full qualification; but some time after the death of the father, he being one of the executors, the other executors put into his name sufficient shares to make up the amount of £25,000. The first point which was raised was this. Art. 91, which refers to the general directors, provides as follows: "The office of a director shall be vacated—": "If he cease to hold the required amount of shares or stock to qualify him for the office or do not acquire the same within one month after election or appointment." Now the Plaintiff did not get that full amount of £25,000 in shares of the company until more than a month after the death of his father. There was considerable argument as to whether it was required that he should have the qualification within one month after the death of his father, at which time he would have become entitled under the contract to be a managing director. In my opinion that does not apply to this gentleman. The words "after election or appointment" are not really apt. He might be considered to be appointed or elected as soon as the contract came into operation as the contract of the company; but that can hardly be so. It could never be intended that as soon as the father, and the son substituted for him after his death, had become by a contract of the company entitled to those positions that the son was then bound to have from his father the £25,000 which is the qualification. But without going into this question I think that this article was not intended to

C. A.
1889
BAINBRIDGE v. SMITH.
Cotton, L.J.

apply to these substituted managing directors, the persons who by contract were entitled in certain circumstances to become substituted managing directors. But then there is something more than that. It does not seem to me that the whole of arts. 85 to 99 apply to the managing directors, but in my opinion it is wrong to say that none of those articles apply to the managing directors. The managing directors with the other directors are the board, and where "directors" in any article here in its terms would properly apply to the whole of the board of directors, that would include the managing directors, but where it would only apply as a rule to the ordinary directors then of course it could not apply to the managing directors.

But I do not think the question really so much turns on that, as upon what the qualification is; upon the question whether we ought to hold that this Plaintiff has obtained the qualification. The qualification is to be the holding in his own right of shares or stock of the company of the nominal value of £25,000, and the great discussion was upon this point as to what was meant by holding in his own right. Mr. *Farwell* put it boldly. He said that this only means that he must be registered for the amount of stock which would be sufficient to make up that sum: but in my opinion this is not correct, because if it were so, why did not the article provide that he should hold or be registered as the holder of this amount, without saying anything about "in his own right?" No one can be said to hold shares in a company unless he is put on the register, and thus is recognised by the company as the owner of the shares; and that in my opinion is a construction which ought to be and must be rejected.

But then, putting aside that meaning of holding in his own right, there was a great deal of argument which turned upon the case decided by the late Master of the Rolls, of *Pulbrook* v. *Richmond Consolidated Mining Company* (1), and also on certain clauses in the articles here, upon which it was said that a man holds in his own right if he is registered without any qualification, and, as I understood Mr. *Buckley*, he relied upon certain articles which refer to the transmission of shares, which are

(1) 9 Ch. D. 610.

arts. 28 and 29. Art. 28 says: "The executors or administrators of a deceased member (not being one of several joint owners) shall be the only person recognised by the company as having any title to his shares." That does not mean that the executors or administrators, unless they become entered on the register as holders of shares by the shares being transferred into their names, shall be considered as members or holders of shares, but only that they shall be the persons who have the legal right to transfer the shares. Then the next article, art. 29, says: "Any guardians of any infant member, and any committee of any lunatic member, and any person becoming entitled to shares in consequence of the death or bankruptcy of any member, upon producing such evidence that he sustains the character in respect of which he proposes to act under this clause, or of his title, as the directors think fit, may, subject to the regulations as to transfer hereinbefore contained, transfer such shares to himself or any other person." This is recognising him before he becomes the holder of the shares as the person who has the right to transfer and deal with them. That being so, in my opinion, those clauses cannot in any way intend that persons should be registered or be on the register as holders of shares with any qualification, so as that the getting rid of that qualification will make them holders in their own right. In my opinion, when you say that they shall be "holders in their own right" of shares, it is to add something to the mere holding of shares, and I think it was intended to guard against mere nominees of promoters being qualified to act as managing directors where they have got shares in name only, but really hold them for somebody else. Without going into all the cases in which a holder of shares could not be considered as holding them in his own right, in my opinion holding in his own right is something more than holding, and it must be shewn that he has not only the legal title which being on the register gives him, but that he is an independent holder, and has got the beneficial ownership of the shares. In my opinion, if a man gives an equitable mortgage of his shares, he is still beneficial owner, and still holds them as long as he holds them in his own right. But if a man is simply put on the register as a mere name, the

C. A.
1889
BAINBRIDGE
v.
SMITH.
Cotton, L.J.

right to the shares being in somebody else, he is not holding in his own right, but holding as a name in the right of somebody else.

With regard to the case which was referred to before the late Master of the Rolls, *Pulbrook* v. *Richmond Consolidated Mining Company* (1), I do not question the decision, because, as I say, if a shareholder mortgages his shares in such a way that he still remains on the register, he is as much interested in those shares as if he had not mortgaged them, because he is interested in seeing that their value is kept up so that they are enough to pay his debts or secure him from any liability to the debt. I do not at all question that decision, but there are certain expressions used by the Master of the Rolls, some of which I do not completely understand, but with regard to which, as I think this is the first time that case has come before the Court of Appeal, I think I ought to express my dissent. The Master of the Rolls seems to have considered that, with the clause to which I have referred in these articles, there might be a registration of a person with some qualification as to title, either as to his being executor, assignee, or something of that sort. But I know of no case where there was any such registration, and in fact any such registration is contrary to what the Master of the Rolls relied upon as the foundation of his judgment, because if the company is not bound to take notice of any trust or obligation, it is hardly possible to suppose that any one could be entered on the register of the company as executor or in any other capacity. He may have power to deal with the shares as executor or otherwise, when he is not on the register, but he is never when on the register mentioned as a person having that power. In my opinion he never can be. I do not know of any case in which he could be registered with the qualification that he was registered in a fiduciary character and not as holder of the shares. I have thought it right to express my view upon that subject, lest it should be said hereafter, if the question ever comes before the Court for decision, that that case was relied upon without the Court of Appeal expressing any doubt as to the correctness of the expressions used by the Master of the Rolls, although his

(1) 9 Ch. D. 610.

judgment, in my opinion, was right upon the only point really to be decided by him.

Now, having expressed my view as to what "held in his own right" means, how did the Plaintiff get these shares? It appears that they were transferred into his name shortly after the death of his father; but one of the Defendants makes an affidavit and says that to the best of his belief the Plaintiff does not hold the shares in his own right, and I am struck with this: that the Plaintiff does not in any way answer that affidavit. But we find that the executors have taken out an administration summons to decide whether this transfer was rightly made by them into the son's name; but it is not yet decided on what terms the Plaintiff holds those shares, whether he holds them only under some family arrangement, or whether the executors and he himself have transferred those shares into his name as in performance of an obligation entered into by the father, without any arrangement entered into by the Plaintiff with the other members of the family. That is a question which still remains to be decided, as I understand, before Mr. Justice *North*, and I think it would be wrong, on the evidence which we have before us, to give any decision as to what are to be considered the rights of the parties in that matter. When the matter has been decided by Mr. Justice *North* we shall probably learn what the real facts of the case are as regards this transfer.

Then what ought we to do? If it turns out that it is only some family arrangement by which he holds those shares, not in his own right, but for the rest of the family, he would not have the qualification required of him, but in the meantime something ought to be done. One of the articles in the part relating to the managing directors, art. 102, introduces the power given against the ordinary directors of removal by a general meeting. I do not think it would be desirable to call upon a general meeting, if called by the Defendants, to do that at present, because they hardly know what the facts are, whether he has the qualification or not; but what I think will be the proper course is this: Mr. *Rigby* intimated that the Defendants were quite ready to call an extraordinary general meeting, and I think that the better course will be to leave it to the Defendants to call an extraordinary

C. A.
1889
BAINBRIDGE
v.
SMITH.
Cotton, L.J.

general meeting and submit to it this question: Whether, if the Plaintiff has the necessary qualification, the meeting desire him to act as one of the managing directors? and then that we ought to direct the appeal to stand over until that meeting is held, and a decision given by that general meeting, suspending the operation of the injunction until that decision is come to.

But I think it right to say that in my opinion, and I believe that my learned Brother agrees with me, if the company says that even if the Plaintiff has the qualification they do not desire him to act as one of their managing directors, we should not grant any injunction, because it would be contrary to the principles on which this Court acts to grant specific performance of this contract by compelling this company to take this gentleman as managing director, although he was qualified so to act, when they do not desire him to act as such. But the only order we at present make will be to direct the motion to stand over, the injunction being suspended until further order on the Defendants' undertaking to call a general meeting without delay, and submitting the question which I have proposed to the decision of that general meeting.

LINDLEY, L.J.:—

I agree with the order which the Lord Justice has stated is to be made, and I agree in all the observations he has made, except one, which is important. I am not prepared to dissent from the view taken by the Master of the Rolls in *Pulbrook* v. *Richmond Consolidated Mining Company* (1). If we had now to consider for the first time what the meaning of the phrase "holding shares in his own right" is, I am not sure that I should take the view which I understand the Master of the Rolls did take; but it is one thing to say that, and another thing to overrule the construction then put upon the phrase, and to overthrow the practice acknowledged and acted upon ever since that decision. The words in question have acquired by usage and upon the strength of that decision a conventional meaning which I for one am not prepared at present to disturb. I think that conventional meaning is this, that a person "holding shares in his

(1) 9 Ch. D. 610.

own right" means holding in his own right as distinguished from holding in the right of somebody else. I do not think the test is beneficial interest, the test is being on or not being on the register as a member, *i.e.* with power to vote, and with those rights which are incidental to full membership. It means that a person shall hold shares in such a way that the company can safely deal with him in respect of his shares whatever his interest may be in the shares. I think that is the conventional meaning which that expression has acquired. Having regard to the deed, which is to my mind quite as important as the articles, my opinion at present is that *primâ facie* Mr. *H. W. Bainbridge* is qualified. His father undertook to qualify him, and he has got the shares. At present I do not see what the answer to that is. Of course I appreciate the observation that he is challenged by other people to say how he holds the shares, and he does not answer that challenge. Perhaps when all the facts come out it may become manifest that he does not hold them in his own right. I do not know, at all events I wish to reserve that question, and not to say, what I really do not think, that that decision of the Master of the Rolls was wrong not only as to the point decided, but as to the grounds of the decision. It affords an extremely convenient practical working rule, and has been acted upon so long that I am not prepared to disturb it. I quite agree with the order which it is suggested should be made.

1889. May 9. This day the case was again mentioned; and it was stated that an extraordinary meeting of the company had been held on the 15th of April, at which a resolution was passed by the shareholders that they did not desire the Plaintiff *Herbert William Bainbridge* to act as a managing director of the company.

THE COURT accordingly dissolved the injunction.

Solicitor for the Plaintiff: *J. Harwood.*

Solicitor for the Defendants: *Frith Needham,* agent for *A. Caddick, West Bromwich.*

M. W.

C. A.
1889
NORTH, J.
March 16.

C. A.
May 31;
June 1.

In re MEDLAND.
ELAND *v.* MEDLAND.

[1889 M. 148.]

Trustee—Trust Estate—Mortgage Securities, Deficiency in—Duty of Trustees as to calling in Mortgage—Discretion—Action by one Trustee against co-Trustees—Practice—Originating Summons—Inquiries—Directions—Administration not asked—Service—Parties—Trustees—Beneficiaries, Absence of—Costs—Jurisdiction—Rules of Supreme Court, 1883, *Order* LV., *r.* 3 (*g*), *r.* 5; *Order* LXV. *r.* 1—*Costs of Shorthand Note of Judgment.*

Per North, J.:—When mortgaged freehold property, on the security of which trust money has been invested, has fallen in value, so that the mortgage debt has come to exceed two-thirds of the actual value of the mortgaged property, it is not the absolute duty of the trustees at once to call in the mortgage, but they have a discretion which they must exercise as practical men with a due regard to all the circumstances of the case, such as the position and solvency of the mortgagor.

Per the Court of Appeal:—An originating summons under Rules of Supreme Court, 1883, Order LV., rule 3, for inquiries or directions, without administration, is equivalent to the old Chancery practice of commencing an administration suit, raising the particular point by the pleadings, obtaining an inquiry or direction upon that point, and then staying further proceedings. Accordingly, upon such a summons, the Court has jurisdiction, provided it has proper parties before it under rule 5, to deal with the question of costs although no estate or fund is sought to be administered: and if the summons has been taken out by trustees, they are precisely in the same position, as regards their right to costs under Order LXV., rule 1, as if it were an ordinary action for administration.

An originating summons was taken out under Rules of the Supreme Court, 1883, Order LV., rule 3 (*g*), by one of the three trustees of a will against his co-trustees to determine whether the trustees ought to call in certain mortgages on which the testator's residuary estate had been invested. One of the Defendants was also tenant for life or widowhood of part of the residue, and the other was beneficially entitled absolutely to a moiety of the residue. The person beneficially entitled to the other moiety, a daughter of the testator, was not a party to the summons, but the Plaintiff and one of the Defendants were two of the three trustees of her marriage settlement which comprised her moiety:—

Held, by *North*, J., that the Court had jurisdiction, notwithstanding the summons did not ask for administration, to direct an inquiry what the trustees ought to do with regard to the calling in of the mortgages, but had no jurisdiction to make any order as to costs, all the persons interested in the trust estate not being before the Court:

Held, on appeal, that the summons had been properly taken out under

Order LV., rule 3 (*g*), and that under rule 5 a sufficient number of the persons beneficially interested in the estate had been served to give the Court the same jurisdiction as to costs as in an ordinary administration action, though the Court had power, if it thought fit, to require any other persons to be served before deciding the question of costs: and that the Judge below ought to have exercised his discretion as to costs under Order LXV., rule 1, by reserving them, as in an administration action, until the inquiry directed had been answered.

Order of *North*, J., accordingly varied by reserving liberty to any of the parties to apply in Chambers as to costs or otherwise.

In the absence of any direction to the contrary the costs of an appeal carry the costs of the shorthand writer's notes of the judgment of the Court below.

ORIGINATING SUMMONS under Rules of Supreme Court, 1883, Order LV., r. 3 (*g*), by *G. F. Eland*, one of the trustees and executors of the will of *William Medland*, who died on the 14th of December, 1872, as Plaintiff, against the other two trustees and executors, as Defendants, asking that the following questions arising in the administration of the trusts of the will might be determined—viz. whether the trustees ought to take any, and, if any, what steps to call in, or otherwise with respect to, certain mortgage securities for the respective principal sums of £2000, £1550, and £2400, and interest, being part of the investments representing a sum of £10,000 held by the trustees upon trusts declared by the will.

By his will, dated the 26th of January, 1872, the testator bequeathed the residue of his personal estate to his wife, his son *Lewis Medland*, and the Plaintiff, upon trust, in the first place, to set apart and appropriate, out of any securities which he might hold at his death, such securities to the nominal amount or value of £10,000 as might be selected by his wife, and upon trust to pay the annual income thereof to his wife, during her life or widowhood, and, after the determination of that trust, he directed that the sum of £10,000, and the securities representing the same, should sink into and form part of his general residuary estate. And he bequeathed his general residuary estate unto his son *Lewis* and his daughter *Helen*, in equal shares absolutely. The testator empowered his trustees or trustee for the time being to permit such part of his personal estate as might at the time of his death be invested upon any security whatever yielding

C. A.
1889
In re MEDLAND.
ELAND v. MEDLAND.

interest, and which might not be required to be converted into money for the then answering the purposes of his will, to continue in the same state of investment so long as they or he should think fit. And he declared that his trustees should not be answerable for any loss sustained by reason of the insufficiency of any security upon which any portion of his personal estate might be invested at his death, and of their continuing the same in that state of investment. And he appointed his wife, his son *Lewis*, and the Plaintiff (who had been his solicitor), trustees and executors of his will. The will contained no power for the trustees to vary the investments of the trust funds.

After the death of the testator his widow selected certain of his securities (including the three mortgages referred to in the summons) to satisfy the legacy of £10,000, and on the 27th of June, 1873, a deed-poll was executed by her and the other trustees appropriating the securities thus selected accordingly.

On the 1st of June, 1875, the testator's daughter *Helen* married *Arthur Paine*, and on the previous day a settlement was executed of her interest under the will, the trustees of the settlement being the Defendant *Lewis Medland*, the Plaintiff, and *Henry Kenneth*. On the same day another deed was executed by the widow, *Lewis Medland*, and *Helen Medland*, with the concurrence of *Paine*, giving the trustees larger powers of investment of the £10,000, with power to vary the investments from time to time.

The names of the mortgagors of the three mortgages mentioned in the summons were respectively *Hardy*, *Smith*, and *Wormsley*. The mortgaged property in each case was agricultural land, some freehold and some copyhold, and the land had become considerably depreciated in value. The interest on the mortgages had, however, been paid by the mortgagors. The trustees instructed a surveyor to report on the value of the property, and on the 1st of October, 1888, he made a report, in which he estimated the value of the property comprised in *Hardy's* mortgage (for £2000) to be £1840; the value of the property comprised in *Smith's* mortgage (for £1550) to be £1665; and the value of the property comprised in *Wormsley's* mortgage (for £2400) to be £2340. The surveyor said that he considered

Hardy's property good security for £1350, *Smith's* for £1400, and *Wormsley's* for £1800.

The Plaintiff and his co-trustees could not agree as to what course should be adopted with regard to the three mortgages. The Plaintiff desired that all the three mortgage debts should be at once called in, with a view to the debt being reduced in each case to a sum not exceeding two-thirds of the actual value of the property on which it was secured. The Defendants did not accede to this view, but they were willing to adopt the valuer's estimate of the amount for which the property was in each case a good security, or even "to split the difference" between that amount and the amount on which the Plaintiff insisted. As the trustees could not come to an agreement this summons was issued by the Plaintiff.

The summons was heard before Mr. Justice *North* on the 16th of March, 1889.

Napier Higgins, Q.C., and *Vaughan Hawkins*, for the Plaintiff:—

There is nothing in the will which entitles the tenant for life of the £10,000 to insist upon a security which has become hazardous being retained by the trustees. But, even if the tenant for life had such a right originally, she has relinquished it by the deed of the 1st of June, 1875, which empowers the trustees to vary the securities. The amount due on each mortgage ought to be reduced so as to comply with the ordinary rule of the Court, that trustees ought not to advance trust money on freehold mortgage security beyond the amount of two-thirds of the value of the property.

Cozens-Hardy, Q.C., and *Hornell*, for the Defendants:—

Under the terms of this will and the appropriation of securities made in pursuance of the directions contained in it, the particular securities appropriated to the bequest of £10,000 stand in the same position as if there had been a specific bequest of them in the will for this purpose—as if the income of those particular securities had been specifically given to the tenant for life. The tenant for life is entitled to have the mortgages retained, subject

C. A.
1889
In re MEDLAND.
ELAND
v.
MEDLAND.

of course to the right of the mortgagors to pay off the mortgages. After the appropriation the trustees had no power to vary the investments, and there could be no breach of trust in retaining the mortgages: *Fraser* v. *Murdoch* (1); *In re Waters* (2).

If the trustees have a discretion in the matter, the Court will not, at the instance of one of their number in opposition to the other two, interfere with their exercise of it, there being nothing to shew any *mala fides*. And the taking of proceedings against the mortgagors to compel them to pay off part of the mortgage debt might result in loss and injury to the persons beneficially interested. It may be doubted whether there is any jurisdiction to deal with the questions raised by this summons otherwise than in an action for the general administration of the trusts of the will.

Napier Higgins, in reply.

NORTH, J.:—

One important question which has been raised is whether, as regards the particular matter which is the subject of the summons, the Court has less jurisdiction than it would have had if the application had been made in an action for the general administration of the testator's estate. One of the great advantages of the recent change in the practice is, that particular questions, as distinguished from the general administration of an estate, can now be decided upon an originating summons, without the necessity of bringing every person interested before the Court, and having every account taken and every inquiry made which would be taken and made in working out a general administration judgment. In my opinion, if this particular question could have been decided in an administration action in the presence of the proper parties, it can be equally decided now in the presence of the proper parties, without an action for general administration.

The point which has arisen is a very simple one. [His Lordship stated the provisions of the testator's will, and the other facts, and continued:—] It was contended on behalf of the Defendants that after the securities (including the mortgages

(1) 6 App. Cas. 855, 864. (2) W. N. 1889, p. 30.

now in question) had been selected by the testator's widow and appropriated by the trustees to answer the legacy of £10,000, the trustees had no power or discretion in the matter, and could do nothing but leave these mortgages to sink or swim, as the case might be. I think it clear upon the will that the trustees had a discretion as to calling in these mortgages, notwithstanding the trust for appropriation. I do not think it was their duty when the value of any of the securities first fell below one and one-half times the amount of the mortgage debt to proceed at once to call in the mortgage debt, and to reduce it to a sum representing only two-thirds of the then value of the property. One of the reasons why a margin of one-third is required in the case of a mortgage of freehold estate is to provide for fluctuations in the value of the property. I do not think, therefore, that the fact that such a diminution had taken place in the value of the property as made the mortgage debt a little more than two-thirds of the value was a reason why the mortgages should be at once called in.

But it is contended by the Defendants that, even if the value of the mortgaged property sank to one-third of its original value, so as to be only half the amount of the money secured upon it, the trustees would have no power to call in the money. In my opinion it was the duty of the trustees, when they found that one of these appropriated mortgages was becoming insufficient to provide for the whole sum advanced on it, to consider what was best to be done for the estate. Of course trustees may often be in a difficulty in such a case. If the mortgaged property had become of no more value, or of less value, than the amount of the mortgage debt, and the mortgagor was dead insolvent, so that no remedy could be had against him, the question what ought to be done would be very different from what it would be if the mortgagor were alive, and were a solvent wealthy man, who could and would pay the mortgage money at once, if required to do so. The matter must be dealt with by practical men in a practical way. They must consider what is expedient to be done at the time. Consulting a lawyer as to what the legal liability and legal position of the trustees would be, if they had money in hand and were going to lend it, would, as it seems to me, go a very short way towards ascertaining what they ought

C. A.
1889
In re MEDLAND
ELAND
v.
MEDLAND.
North, J

to do with respect to a particular fund already invested. I do not think the trustees have acted altogether as they ought to have done. I am satisfied that the Plaintiff was not at all reasonable in the view which he took, that the only thing to be done was to proceed at once to call in so much of the mortgage money as was necessary to reduce the amount left on mortgage to two-thirds of the actual value of the property. It is impossible to say that whenever a mortgage security depreciates in value that must be right. It might possibly have been right in the case of *Hardy's* mortgage, where the deficiency is said to be considerable, but where the mortgagor was not himself in possession, the property being let to tenants who paid their rent, and that rent being more than sufficient to pay the interest in full. I do not see why in that case steps should not have been taken to call upon the mortgagor to reduce the amount of the debt very considerably. On the other hand difficulties have arisen, and I am not in a position to say what is best to be done under the circumstances. It appears that the two other mortgage securities have also diminished considerably in value, and that the interest has always been duly paid.

Under these circumstances it certainly seems to me *primâ facie* that an application should be made to the mortgagors to reduce the amount due upon the mortgage.

But another element must be taken into consideration. The mortgagors are in occupation of the property, and it might be very much the worse for the trust as a whole to require them to reduce the mortgage debt if the result should be that they could not continue occupying the property, and it were thrown without tenants upon the hands of the trustees. What it is advisable to do as regards those two mortgages I have not the means of saying at present. If the amount of the debt can be reduced without otherwise practically injuring the security by leaving the property unoccupied, it certainly should be done. If, on the other hand, the result would probably be to leave the property unoccupied without tenants, and producing no rent, it might be very inexpedient to call in the debt. I have no sufficient evidence to enable me to answer the question now. But I am satisfied that the Defendants' contention that they are not

responsible—that they have a discretion which they have a right to exercise by leaving matters alone—is untenable. I can only direct an inquiry in Chambers what ought to be done about these securities. That I have jurisdiction to do so I am satisfied, notwithstanding the argument which has been addressed to me on behalf of the Defendants; and I can see no other way of solving the question what is to be done with respect to these three mortgages.

As regards the costs of the summons, in my opinion I have no jurisdiction to give costs to any party. The three trustees are the only parties before the Court, Mrs. *Medland* being also beneficially entitled during widowhood to the income of the £10,000. One trustee is taking proceedings against the other trustees and the beneficiaries are not before the Court. It is true that *Lewis Medland*, who is brought here as a trustee, is also beneficially entitled to one moiety of the testator's property, and I am told (though this does not appear on the summons) that the Plaintiff and the Defendant *Lewis Medland* are two of the three trustees of the settlement made by Mrs. *Paine*. She is not before the Court, and one of her trustees is not before the Court, and the other two are not here in the character of trustees of her settlement. I feel bound to give what assistance I can to the trustees of the will in solving the difficulty which has arisen; but I cannot answer the question at the expense of the trust estate when all the persons interested in it are not before me.

W. L. C.

The Plaintiff appealed from the decision so far as it disallowed his costs of the action, and he asked that his costs of the action, as between solicitor and client, might be paid or provided for, including his costs of the present appeal.

The appeal was heard on the 31st of May and the 1st of June, 1889.

Napier Higgins, Q.C., and *Vaughan Hawkins*, for the Plaintiff the Appellant:—

We were justified in coming to the Court to have the particular question raised by the summons decided, and having done so in

C. A.
1889
In re MEDLAND ELAND *v.* MEDLAND

the manner prescribed by Rules of the Supreme Court, 1883, Order LV., rule 3 (*g*), we ought to have been allowed our costs. The only ground alleged by the learned Judge for refusing them was that he had no jurisdiction to allow them, as he had not the whole of the beneficiaries before him: but rule 5, subsect. A (*a*) of Order LV., prevents the necessity of bringing all the beneficiaries before the Court on such a summons as this, for it says that a summons under rule 3 (*g*) shall be served on "the persons, or one of the persons, whose rights or interests are sought to be affected." Here the learned Judge had before him the three trustees and executors of the will, the tenant for life of the £10,000 directed by the will to be set apart out of the residue, and the beneficial owner of one moiety of the residue, the other moiety being represented by the executors. We had thus brought ourselves within rule 5, and should therefore have been allowed our costs.

Cozens-Hardy, Q.C., and *Hornell*, for the Defendants:—

The first objection to this appeal is, that it is merely an appeal for costs, for which no leave has been obtained pursuant to sect. 49 of the *Judicature Act*, 1873. Under Rules of Supreme Court, 1883, Order LXV., rule 1, costs are in the discretion of the Court in every case not falling within the first proviso to that rule, which is to the effect that an executor, administrator, trustee, or mortgagee who has not unreasonably taken proceedings shall not be deprived "of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division." But under the rules acted upon in the old Court of Chancery a trustee was only entitled to his costs where there was a particular estate or fund out of which they could be paid. The well-known doctrine that, if trustees properly commence an action to administer the trusts of a fund, the Court has full power to order their costs to be paid out of that fund, does not apply in a case such as this, where an originating summons has been taken out under Order LV., rule 3, asking simply for the determination of a particular question relating to the trust without administration.

Again, this is, as the learned Judge below pointed out, simply a dispute between trustees as such, no one being before the Court in the character of a beneficiary; and therefore he considered he had no jurisdiction to order costs to be paid out of the estate. Even assuming that some of the beneficiaries were properly before the Court, it is not in accordance with the practice of the Court to deal with the costs at this stage.

[FRY, L.J.:—Then do you say that the Court ought to have reserved the costs until the other persons had been served?]

We say that the learned Judge had no jurisdiction to make the order he made on this summons, and that the Applicant ought to have been ordered to pay the costs of it.

Napier Higgins, in reply:—

Unless we have unreasonably instituted these proceedings we are entitled to our costs under Order LXV., rule 1. I submit that our summons was right in form, for we had the life estate and the capital sufficiently represented, and the Court was therefore in a position to exercise its discretion under the rule, and ought to have exercised it by giving us our costs. It cannot be the intention of the rules that a trustee who has come properly before the Court should bear the whole of the costs of his proceedings.

LORD ESHER, M.R.:—

The question we have to decide is, whether, having regard to the construction of the Rules and Orders, the learned Judge had, upon this summons, jurisdiction at some time or other to deal with the costs of it; because his decision is that he had no jurisdiction to do so at any time, either at the time when the case was before him or at any other time.

Now the case seems to me to stand thus. Is the summons a right summons taken out under rule 3 of Order LV.? Rule 3 says that the trustees under any deed or instrument "may take out, as of course, an originating summons returnable in the Chambers of a Judge of the Chancery Division for such relief of the nature or kind following, as may by the summons be specified and as the circumstances of the case may require (that is to say), the determination, without an administration of the estate or

C. A.
1889
In re
MEDLAND.
ELAND
v.
MEDLAND.
Lord Esher, M.R.

trust, of any of the following questions or matters:" amongst them being, as stated in sub-section (*g*) of the rule: "The determination of any question arising in the administration of the estate or trust." It seems plain to me that the question raised upon this summons is such a question as is described in sub-section (*g*) of the rule, and it is a question raised by trustees under a deed or instrument. Therefore the case is so far within Order LV., rule 3.

Then, as to the parties to the summons, rule 5 of the same Order says: "The persons to be served with the summons under the last two preceding rules in the first instance shall be the following (that is to say):—*A*. Where the summons is taken out by an executor or administrator or trustee" (here it is taken out by a trustee), "(*a*) for the determination of any question in sub-ss. (*a*), (*e*), (*f*), or (*g*) of rule 3"—this summons is for the determination of a question in sub-sect. (*g*)—"the persons, or one of the persons, whose rights or interests are sought to be affected." This summons has been served at all events on one of the persons whose rights or interests are sought to be affected. It may be that it has been served on two, but it has been served on one of them. Therefore you have the summons properly taken out under rule 3, and you have it properly served under rule 5.

If that is so, what is the result as to costs? Order LXV., rule 1, says that "the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge." Therefore that rule gives the Judge immediate jurisdiction to deal with the costs of such a summons as this, subject to this proviso in the same rule: "Provided that nothing herein contained shall deprive a . . . . trustee . . . . who has not unreasonably instituted or carried on . . . . any proceedings, of any right to costs out of a particular estate or fund." Thus, under the first part of that order, the Judge would have discretion; under the proviso in the particular case of trustees he has to consider whether the proceeding has been unreasonably instituted or carried on. If it has not, he is bound, in my opinion, to give costs. If it has been unreasonably instituted, he is not to give costs. Therefore, taking these rules and orders together, it seems plain to me that

the learned Judge had jurisdiction to deal with the question of costs. He decided that he had no jurisdiction, and therefore did not exercise his mind, and gave no judicial opinion really on the question.

Upon this appeal it was suggested to us that he was bound to give his decision upon the question of costs at the time. I cannot accede to that argument, and I think Mr. *Higgins* eventually felt that he could not maintain it. In my opinion the learned Judge was not bound to give his decision at the time. I am not prepared at all to say that under some circumstances the Judge could not give his decision as to costs at the time; but I am quite clear he is not bound to do so. If, then, he is not bound to do so, what may he do? If he is not bound to give his decision as to costs at the hearing of the summons, and he has jurisdiction, he may reserve the exercise of that jurisdiction until another time. In my opinion a Judge under some circumstances might decide the question of costs at the time the summons comes before him for hearing; but the Judge has not done so in this case. As he has not done so, and has declined to exercise his judgment upon the matter, it follows that it must be reserved. Therefore, the Judge having declined or neglected to decide the question of costs at the time, the order ought to have been that he reserved the question. As I understand from my learned Brothers, who know more of the practice than I do, the proper course, under ordinary circumstances, for the Judge to take on the hearing of such a summons as this, is to reserve the question of costs; and, assuming there is power to deal with the question at the moment, that power should only be exercised in plain and unusual circumstances; the ordinary course is to reserve the question of costs.

The order of the learned Judge must accordingly be modified by reserving the costs, and then all subsequent steps in the matter will be taken in the ordinary course, as directed by rule 33 of Order LV.

COTTON, L.J.:—

There are two questions to be decided here, one apparently of considerable importance, namely, first, whether the Judge had

C. A.
1889
In re MEDLAND.
ELAND v. MEDLAND.
Cotton, L.J.

jurisdiction and power to make any order as to costs; and, secondly, if there was power to give any direction as to costs, what ought to be done as to them.

As regards the first point, in my opinion the Judge had power, even as this summons stood, to give directions as to costs. What is this summons? It is a proceeding under rule 3 of Order LV.; and the object of that rule is to enable the Court to decide questions which may arise in the administration of an estate without the necessity of an administration by the Court, which in former days would in such a case have been asked for; but now, where an administration of an estate is asked for, it is not at all unusual for a Judge to ask, "What is the question here?" and, although an administration is asked for, to confine the action simply to the determination of the question as to which there is a difficulty and on which the trustees or executors reasonably require the direction of the Court.

This summons was taken out under rule 3 of Order LV., sub-sect. (*g*), which is the sub-section covering this case, and which enables a summons to be taken out for "the determination of any question arising in the administration of the estate or trust." It would be fatal to say there was no jurisdiction on such a summons as regards costs, because that would involve, in every case where the trustees did not like to go to the whole expense of obtaining the opinion of the Court, the necessity of asking for administration in order to bring the matter within the rules applied by the Chancery Division to the administration of estates. In my opinion, the matter must be considered as regards the question of costs—assuming that the summons has been properly served—just in the same way as if there was an action for administering the trust of an estate, otherwise the result would be that unnecessary expense must be incurred merely to decide whether costs ought or ought not to be allowed.

Then it is said, not that there is no jurisdiction—that I think Mr. *Cozens-Hardy* did not argue—but that for two reasons it would be wrong to deal with the question of costs in the present state of the proceedings, the first reason being that the proper parties had not been served so as to enable the Court to deal

with the question, though the learned Judge did not direct the matter to stand over for other parties to be served. In my opinion it is clear that when the matter was before him there were present all those persons who of necessity ought to have been served upon such a summons, because, although the persons who are here are the three trustees, one being the Plaintiff or Applicant, and the other two being the Defendants or Respondents, one of these two is interested in the *corpus*, and the other is interested in the life estate. What is required by rule 5 of Order LV. is that some "or one of the persons" interested shall be served. I do not at all say that the Judge in his discretion might not have refused to give any direction for inquiries until he had somebody else before him. He might have said, "I will not decide this question at all till I have before me some one, not an executor or trustee of the will, to represent certain persons interested under the will in the *corpus* of the estate." But he did not do that; and in my opinion he should have dealt with the matter as in an action for the administration of the estate, and should have given directions as to the costs, subject to the exercise of his discretion as to whether other persons ought to be served before finally deciding the question of costs. Then, on a summons being taken out under Order LV., rule 33, for directions to proceed with the inquiry under the order made on the summons, there would come before the Judge the question as to whether all proper persons had been served; and then, if the Judge thought that for the purposes of the inquiry, or for any other purpose, any other person ought to be served, such as the third trustee of Mrs. *Paine's* settlement, who is practically the only other person who could be served, he would decline to go on until that person had been served. To say that all the *cestuis que trust* under that settlement ought to be served would, in my opinion, in the present state of the law and practice in the Chancery Division, be utterly wrong. The trustees do represent those for whom they are trustees. Of course, in certain cases it may be right that the persons beneficially interested should be before the Court; but it is now a great improvement in the practice that trustees may represent, for the purposes of an action affecting the trust estate, those who are beneficially interested in the estate.

C. A.
1889
In re
MEDLAND
ELAND
v.
MEDLAND
Cotton, L J.

In my opinion there was jurisdiction here to make the order as to costs; a jurisdiction which might have been exercised either in the presence of these parties, or when any other persons whom the Judge might think ought to be served were before the Court. It seems rather an anomaly to say that, where the Court has power to give directions for inquiries, it cannot deal with that which must be the consequence of such directions, namely, the costs of the inquiries.

But then comes the question whether we ought now to deal with the costs. I do not for one moment say that the Court has not the power to deal at once with the costs; and in many cases it might be right for the Court to deal with the costs at once; but in a case like this, where an inquiry has been directed as between the trustees, I think the better course is not to deal with those costs until the result of that inquiry is known. It may appear, as the result of the inquiry, that the Plaintiff was entirely right in the course he took; and it may appear that the Defendants, although they were wrong, had some reasons for making the objections they did. We have not heard the facts of the case, and therefore I must not be taken as giving any opinion as to whether the inquiry should have been directed; but I think we ought not now to interfere with what was the discretion of the Judge—assuming he had jurisdiction—as to whether the costs should be adjudicated upon now or only when the result of the inquiry is known to him. Therefore, all we can do now is to express our opinion that there is jurisdiction and power to deal with the costs, and to add to the order these words: "Any of the parties may be at liberty to apply in Chambers as to costs and otherwise as they may be advised."

It occurred to me whether we ought in terms to reserve the costs; but, as no further consideration is reserved, the Registrar says that it is not necessary, having regard to the addition we have made to the order. To prevent any difficulty, we say our view is that the question ought to be decided by the Judge when the result of the inquiry is made known. If the Judge thinks it right that the other trustee of Mrs. *Paine's* settlement should be served, then the necessary direction will be given for that purpose.

FRY, L.J.:—

I am of the same opinion. The learned Judge in this case has declined jurisdiction; and he has declined jurisdiction apparently on the ground that all the *cestuis que trust* were not before the Court. Now I am of opinion that there is no defect of jurisdiction in an administration proceeding of this description, even although all the *cestuis que trust* be not before the Court. In this case some of the *cestuis que trust* were before the Court. I know of no rule of law which requires that they shall all be present. The procedure under 15 & 16 Vict. c. 86 enabled the Court to pronounce a decree in an administration action in the presence of one or more of the beneficiaries. It is quite true that the service on the other beneficiaries was required in many cases, and that may still be directed. Therefore the simple question seems to be this, whether the learned Judge in this case, having jurisdiction, as he considered and no doubt rightly considered, to direct an inquiry, had no jurisdiction either to deal with the costs on that occasion or to reserve the costs. Now, like the Master of the Rolls and the Lord Justice, I do not say it is not competent to the Court to decide the matter then and there; but I am clearly of opinion that the more ordinary, and in this case the proper, course was to reserve the costs, and that course was proper for two reasons: the one is that the answer to the inquiry would in all probability have thrown light upon the propriety of the conduct of the Plaintiff and Defendants in the matter in question; and the other is this, that—as has already been pointed out—when this summons was proceeded with, or rather before the summons was proceeded with, it would be the duty of the Judge in Chambers to direct upon what persons service of the order should be made. The question of costs therefore, if reserved, would come on for determination in the presence of all those persons so directed to be served. They might have a more direct interest in protecting the estate from costs than any of the persons present before the Court in the first instance. Therefore I think the learned Judge had the power either to deal with the costs or to reserve the costs for further determination, and that the proper course was so to reserve them, and I agree that the alteration in the form suggested by the

C. A.
1889
In re MEDLAND.
ELAND
v.
MEDLAND.

Lord Justice is an adequate and proper mode of giving effect to our opinion.

COTTON, L.J.:—

The Master of the Rolls has suggested to me that what I said as to costs might be misunderstood. I mean that the Judge had a discretion as to whether he would decide the question of costs immediately or whether he would decide it after the inquiry had been answered. I meant that he had an absolute discretion as to the costs of the trustees, which must be dealt with according to the proviso in rule 1 of Order LXV. As I said before, in my opinion the costs of any proceeding under Order LV. ought to be dealt with on the same footing as if it were an action for administering the trust. The trustees in this case could not be properly put in a different position in regard to their costs simply because the proceedings were taken in the least expensive way, in order to avoid the more expensive proceeding of coming before the Court by action.

FRY, L.J.:—

I should like to add that I take entirely the same view of the application of the proviso in Order LXV., rule 1. It should be understood that the proceeding by a summons for inquiries or directions without administration is exactly equivalent to the old practice of commencing an administration suit, raising the particular point by the pleadings, getting an inquiry or direction upon that point, and then staying further proceedings in the suit. The present proceeding is really exactly analogous to that.

LORD ESHER, M.R.:—

The appeal will be allowed; and we think that both sides should have their costs out of the fund.

Napier Higgins, Q.C., asked that the costs should include the costs of the shorthand notes of the judgment of the Court below.

COTTON, L.J.:—

We have given a general direction that the costs of the shorthand writer's notes of the judgment are always to be allowed without any special application. That should be taken as the rule unless we give some direction to the contrary. It must be always understood that where we give costs they are to include the costs of the shorthand writer's notes of the judgment.

Solicitors for Plaintiff: *Palmer, Eland, & Nettleship.*
Solicitors for Defendants: *Hopgood & Dowson.*

G. I. F. C.*

KAY, J.

1889

March 18, 23.

In re STEWART.

Solicitor—Bill of Costs—Taxation—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *s.* 7—*General Order under the Act, rr.* 2, 6, *Sched. I., Part I., r.* 11—*Business completed before Order came into operation—Pending Business—Notice of Election—"Undertaking any business"—Lands Clauses Consolidation Act,* 1845 (8 & 9 *Vict. c.* 18), *s.* 82 [*Revised Ed. Statutes, vol. ix., p.* 647]—*Purchasers' Costs under that Act—Conveyance—Grant of Easement over Land.*

The General Order under the *Solicitors' Remuneration Act,* 1881, is, by virtue of sect. 7 of the Act, applicable to business completed before the Order came into operation.

The expression "undertaking any business" in rule 6 of the Order, means not merely accepting the retainer, but rather entering upon the work, that is, doing something for which the solicitor is entitled to make a charge, whether such charge is or is not covered by the scale fee under the Order.

Solicitors were employed by a corporation in purchases of property for a waterworks scheme effected under statutory powers. The employment commenced before, and continued after, the date when the General Order under the *Solicitors' Remuneration Act,* 1881, came into operation. After that date the solicitors gave the corporation notice, under rule 6 of the Order, that they elected to charge for the business done after the commencement of the Act according to the old system as altered by Sched. II. to the Order. The solicitors delivered bills of costs relating (1) to business completed before the Order came into operation; (2) to business pending when the Order came into operation in which work was done after the Order came into operation and before the notice of election was given, and (3) to business so pending in which no work was done after the order came into operation until after the notice of election was given:—

Held (1), that as to the completed business the Order applied, and the taxation must be according to the scale in Sched. I.;

(2), that as to the pending business in which work was done before notice of election, whether or not of a kind covered by the scale fee, the notice was ineffectual, and the taxation must therefore be according to the scale;

(3), that as to any separate matters of conveyancing in which no work was done until after the notice of election, the notice, according to the decision in *In re Love* (1), was effectual, and the taxation must therefore be according to the old system as altered by Sched. II.

Quære, whether where work is done by solicitors under one and the same retainer it is competent for them, by delivering separate bills of costs for

(1) 40 Ch. D. 637.

various branches of the work, to exclude the operation of the Order as to some of such bills.

The exception contained in rule 11 of Sched. I., Part I., of the General Order, whereby in the case of sales under the *Lands Clauses Act* the scale is rendered inapplicable, extends only to vendor's costs and not to the costs of the purchasers.

Grants by way of sale of rights and easements of laying and maintaining pipes in land are not "conveyances of property" within Sched. I., part I., and consequently the scale is not applicable to solicitors' charges in respect of such grants.

ADJOURNED SUMMONS to review taxation.

The Applicants, Messrs. *W. H. & M. Stewart*, were employed by the corporation of *Wakefield* as their solicitors in carrying out work in connection with a waterworks scheme under the *Wakefield Corporation Waterworks Act*, 1880. The Act incorporated the provisions of the *Lands Clauses Consolidation Act*, 1845, and empowered the corporation to take lands compulsorily.

In the course of their employment the Applicants acted in giving notices to treat in respect of land and property required by the corporation, in settling claims for compensation by arbitration and otherwise, and in investigating titles and conveying property.

The General Order under the *Solicitors' Remuneration Act*, 1881, having come into operation on the 1st of January, 1883, the Applicant, *W. H. Stewart*, on the 10th of May, 1883 (with the view of giving notice of election pursuant to rule 6 of the Order), addressed to the corporation a letter as follows:

"*Wakefield Corporation Waterworks.*

"In accordance with the provisions of the *Solicitors' Remuneration Act*, 1881, I desire to inform the corporation that I elect to make my charges against them for the business done in connection with the new waterworks undertaking after the commencement of the Act according to the old system of making out solicitors' charges as altered by Sched. II. to the Order made in pursuance of the Act."

The Applicants delivered to the corporation fifty-nine bills of costs in respect of the business done by them, for sums amounting in the aggregate to £3204 14*s.* 8*d.* Some of these bills had reference exclusively to each of the following classes of

KAY, J.
1889
In re STEWART

business; (1), business which was completed before the 1st of January, 1883, when the General Order came into operation; (2), business pending on the 31st of December, 1882, in which work to which the *ad valorem* scale in Sched. I., part I., to the Order, was applicable had been done since that date and before the 10th of May, 1883, when the notice of election was given; (3), business so pending in which work to which the scale was not applicable had been done during the same period; (4), business so pending in which no work was done during the same period, but which business was continued after the 10th of May, 1883; (5), business done in respect of purchases of land taken by the corporation under the provisions of the *Lands Clauses Consolidation Act*, 1845; (6), business done in respect of purchases by and grants to the corporation of rights or easements of laying and maintaining lines of pipes through and over lands not so taken, which rights or easements were acquired by the corporation under their statutory powers. By the grants in question no land whatever was conveyed, but merely the right of laying and maintaining pipes through or over land, and of entering upon the land from time to time for such purposes. The purchase-money was in each case a small sum of money, *e.g.* £5 or £10.

On the 14th of October, 1886, an order was made for the taxation of the bills, and on the 16th of February, 1888, the Taxing Master made his certificate settling the bills at the sum of £2440.

In respect to the business comprised in the classes numbered above 1, 2, and 3, the Taxing Master had taxed the bills according to the scale in Sched. I., part I., to the General Order. In respect to the business comprised in class 5 he had taxed the bills as if they did not come within the exception of "sales under the *Lands Clauses Consolidation Act* or any other private or public Act under which the vendor's charges are paid by the purchaser," contained in the 11th rule of Sched. I. part I. In respect to the business comprised in class 6, he had treated the grants above mentioned as being conveyances to which rule 2, sub-rule (*a*), and the scale in Sched. I, part I., of the General Order were applicable.

The Applicants carried in various objections to the taxation, and the Taxing Master, in answer to such objections, stated his reasons for so taxing the bills. The grounds of objection taken and the reasons of the Taxing Master, so far as material, sufficiently appear from the arguments and judgment.

This was a summons by the Applicants asking that their objections to the taxation might be allowed and that it might be referred back to the Taxing Master to vary his certificate accordingly.

Sir *H. Davey*, Q.C., and *Swinfen Eady*, for the Applicants:—

As to the business completed before the General Order under the *Solicitors' Remuneration Act* came into operation, the taxation ought to be according to the old system. The Order does not apply to such business. The mode of a solicitor's remuneration must be determined according to the time when he undertakes the business. The Order is to take effect from and after the date therein named, that is, it is to regulate the remuneration of solicitors for all work to which it is applicable, done from and after that date. By rule 6 of the Order the solicitor has a right to elect that his remuneration shall be according to the existing system as altered by Sched. II., but he is to make his election "before undertaking any business," and therefore, if the Order applied to business previously done, it would be impossible for the solicitor to make any election as to such business, and he would be placed in a worse position as to work already completed than as to work commenced subsequently. Moreover, upon this construction of the Order, the effect of it would be to alter *ex post facto* the contract between the solicitor and his client, under which the solicitor was entitled to be remunerated according to the existing law. It cannot be supposed that the Order was intended to have such a retrospective operation. *In re Field* (1) has no application on this part of the case, because there the decision was only as to business pending when the Order came into operation. There are, no doubt, observations of the learned Judges tending to shew that the Order is applicable to business already completed (see in particular, Lord Justice *Fry* (2)), but

(1) 29 Ch. D. 608. (2) 29 Ch. D. 616.

KAY, J.
1889
In re STEWART.

they are mere *dicta*, not necessary for the decision of the case. Even if the Order applies, it does not follow that the scale is applicable; for taxations according to the old system (subject to the variations in Sched. II.) are regulated by the General Order no less than those which are subject to the scale; see the decisions in the House of Lords in *Newbould* v. *Bailward* and *Parker* v. *Blenkhorn* (1), reversing decisions of the Court of Appeal in *In re Newbould* (2) and *In re Parker* (3).

As to business pending when the Order came into operation, in which work to which the scale is applicable was done before the 10th of May, 1883, when the notice of election was given, it must be admitted that the decision in *In re Field* (4) applies, and that the notice of election was therefore too late; but, as to the other pending business, it is submitted that the notice of election was effectual and that the taxation ought to be according to the old system as altered by Sched. II. Rule 6 of the Order only applies where the solicitor, after the Order came into operation, undertakes any business to which the scale would be applicable in the absence of election to the contrary. The solicitor has complied with the requirement of that rule if he makes his election at any time before he has set his hand to work to which the scale is applicable. The decided cases are consistent with this view: see *In re Allen* (5); *Hester* v. *Hester* (6), where Lord Justice *Lindley* (7) intimated that the business was undertaken when the solicitor "first did any work covered by the scale fee," and *In re Love* (8), which is expressly in point.

As to all work done for the corporation as purchasers under the *Lands Clauses Act*, the scale is clearly not applicable, because the case comes within the exception contained in the concluding part of rule 11 of Sched. I., part I. of the Order, providing that "in case of sales" under that Act "or any other private or public Act under which the vendors' charges are paid by the purchaser," the scale shall not apply. The words are perfectly general, and apply as much to the costs of the public body purchasing as to

(1) 14 App. Cas. 1.
(2) 20 Q. B. D. 204.
(3) 59 L. T. (N.S.) 491; W. N. 1888, p. 108.
(4) 29 Ch. D. 608.
(5) 34 Ch. D. 433.
(6) Ibid. 607.
(7) Ibid. 617.
(8) 40 Ch. D. 637.

the costs of the vendor. It is true that the reference is to "sales" only, and not to purchases, but there cannot be a sale without a purchase. There are good reasons for the exception; for the purchasers may, as is often done, restrict the costs by not requiring so long a title, or such full evidence of title as they would insist on if the vendor had to bear his own costs. Moreover, railway companies have to go through very expensive proceedings for the purpose of purchasing small strips of land, and the costs necessarily incurred are out of all proportion to the purchase-money, so that the *ad valorem* scale would be unjust to solicitors. The words referring to other Acts of Parliament are merely descriptive of Acts of a similar purport to the *Lands Clauses Act*. The Taxing Master has said that the *Lands Clauses Act* does not affect purchasers' costs. But this is inaccurate, inasmuch as sect. 82 of that Act refers to the costs "as well of the seller as of the purchaser."

The purchases by the corporation of the easement or right of laying pipes are not business within sub-rule (*a*) of rule 2 of the General Order, but fall within sub-rule (*c*), and the grants of such easements are not conveyances within the meaning of Sched. I., Part I., so that the *ad valorem* scale is not applicable, but the taxation ought to be according to the old system as altered by Sched. II. No land was conveyed by these grants, which were merely in the nature of licenses to the corporation to lay and maintain pipes over the land of others. The purchase-moneys were small sums, but the work might extend to a difficult investigation of the title of the grantor, and be as great as if the land itself were conveyed. Therefore the *ad valorem* scale would be a peculiarly inappropriate mode of payment. The Taxing Master has relied on the definition of "conveyance" in sect. 2 of the *Conveyancing Act*, but that definition is only for the purposes of that Act, and it is not permissible to construe one Act of Parliament by a definition clause contained in another. Moreover, the definition goes a great deal too far for the purpose, as it includes every assurance of every interest in land.

Renshaw, Q.C., and *R. F. Norton*, for the Corporation:—

The Taxing Master was right in holding that the *ad valorem*

KAY, J.
1889
In re
STEWART.

scale was applicable. As to the completed business, the words of sect. 7 of the *Solicitors' Remuneration Act* are express: "As long as any General Order under the Act is in operation, the taxation of bills of costs of solicitors shall be regulated thereby." This provision extends to every taxation of costs which takes place after the Order comes into operation. The time at which the remuneration of the solicitor is fixed is the date of the order to tax. At any time after the Act was passed solicitors could obtain an order to tax, and, if they did, the taxation would be on the old system. The General Order was issued in August, and published in September, 1882, and it did not come into operation until the 1st of January, 1883; no injustice, therefore, was done to solicitors who had this interval of time in which to obtain an order to tax if they desired to be remunerated according to the old system.

As to the pending business, the Taxing Master rightly held that the notice of election was ineffectual. The business is "undertaken" within the meaning of rule 6 of the Order the moment the solicitor does any work for which he can make a charge, whether that charge be covered by the scale fee or not, and as to pending business he must elect before he does anything which it is necessary to do in the course of carrying out the business which he has already undertaken: *Hester* v. *Hester* (1). In *In re Love* (2) the question before Mr. Justice *Stirling* was as to separate matters of conveyancing, in which no work was done until after the notice of election was given, and that decision is only applicable to that extent.

The exception in rule 11 of Sched. I., part I., to the General Order has no application to the purchasers' costs under the *Lands Clauses Act*. Sect. 82 of that Act provides only for the costs of the vendor, and not for the costs of the purchasers, who are the promoters of the undertaking, and, of course, have to pay their own costs. The section deals with the question of costs as between vendor and purchaser, not as between solicitor and client. The words "as well of the seller as of the purchaser" were inserted in the section because, as the law then stood, a purchaser often incurred costs which he had a right to recover over from the

(1) 34 Ch. D. 607, 614. (2) 40 Ch. D. 637.

vendor. In the earlier part of rule 11 reference is made to negotiating in case of sales or purchases, while in the later part, containing the exception, sales only are mentioned, so that the distinction between sales and purchases is clearly indicated. The object of the exception was to prevent any implied repeal of the *Lands Clauses Act* as to vendor's costs, and the words referring to other Acts "in which the vendor's charges are paid by the purchaser" shew plainly that the intention was to limit the operation of the exception to vendor's costs. There can be no injustice to the solicitor in applying the *ad valorem* scale; because he can protect himself by electing under rule 6 of the General Order.

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The grants of easements are clearly conveyances of property within the meaning of Sched. I., part I. The *Solicitors' Remuneration Act* and the *Conveyancing Act* were passed in the same year, and form one scheme of legislation, and the Taxing Master was justified in referring to the definition clause in the *Conveyancing Act*. An easement or right of laying pipes in land is a right or interest in land, and is clearly property.

[KAY, J.:—There was merely a license to do certain acts.]

It is property just as much as an exclusive right of fishing in gross or an exclusive right of common. The General Order in rule 2, sub-rule (*c*), specially provides for mining licenses and takes them out of sub-rule (*a*), and as there is no exception of other licenses they must be included. For the reason already given there can be no injustice to the solicitor.

Swinfen Eady, in reply.

1889. March 23. KAY, J.:—

The corporation of *Wakefield*, under a special Act which incorporated the general Acts and empowered them to take lands compulsorily, have been engaged in establishing waterworks. In this business they have employed the present Applicants as their solicitors. Such employment commenced before the passing of the *Solicitors' Remuneration Act*, 1881, and continued after that Act, and the rules made under it, came into operation.

In respect of the work so done voluminous bills of costs have

KAY, J.
1889
In re
STEWART.

been delivered, and by an order of the 14th of October, 1886, these costs were referred to taxation. The taxation has been completed, and the solicitors have carried in various objections.

The first and most important of these relates to work which was completed before the 1st of January, 1883, when the General Order under the *Solicitors' Remuneration Act* came into operation. The bills of costs numbered 9, 17, 24, 27, and 29 are, it is said, bills concerning conveyancing business which was altogether completed before that date, and was not business which was pending in any sense at the time when the Order came into operation. The 7th section of the Act is in these words: "As long as any General Order under this Act is in operation, the taxation of bills of costs of solicitors shall be regulated thereby."

It is argued that, whenever the work was done, if the taxation takes place after the General Order came into operation, such taxation must be regulated by the General Order, and that consequently if the work is such that the scale charge fixed by the Order would apply, if it had been done after that date, it must apply by the terms of the Act, although the work had been completed previously. On the other hand it is contended that to such work the General Order does not apply at all. If it did, the solicitor would lose the power of electing given to him by the 6th clause of the General Order altogether, and he would thus be in a worse position as to work completed before that date, when there was no such Order in operation at all, than as to work commenced subsequently, with respect to which he would be able to elect whether the scale fee should apply or not. It is admitted that if it be work to which the General Order applies the 7th section of the Act is express and imperative as to the regulation of the taxation, but it is urged that the work in question was done under a different law, and the contract between client and solicitor could not be intended to be altered by an Order *ex post facto*.

These are excellent and cogent reasons for saying that sect. 7 of the Act should not have been in its present form, or that the General Order should have made an exception in the case of conveyancing work completed before it came into operation and taxed afterwards; or again, if the enactment were ambiguous,

they would be reasons for giving the Applicants the benefit of any doubt upon its construction.

Sect. 7 is express and clear; it admits of no doubt; it is not at all ambiguous. Any taxation after the General Order comes into operation is to be regulated thereby. It is impossible to deny that this includes the taxation, after that date, of costs incurred before.

The Act received the royal assent on the 22nd of August, 1881. The operation of the General Order was purposely delayed till after the 31st of December, 1882, though it seems the Order was issued in August, and published in September, 1882. This delay must have been intended to give an opportunity to any one who desired it to tax costs under the old rule before the Order began to operate. If the Applicants did not choose to avail themselves of this, there is no injustice in now subjecting them to the operation of the General Order, as sect. 7 of the Act says shall be the case.

Another view of the matter, which is of some importance, is that all this work was done under one and the same retainer, and this delivery of separate bills, and the attempt to say that some of such bills do not come within the Act and Order, is scarcely a legitimate mode of increasing costs against the corporation. If all the work done under this retainer were included in one bill of costs in order of date, it would be hardly possible to argue that a line should be drawn on the 31st of December, 1882, and everything before that date should be taxed under the old system, but everything since should be taxed under the General Order. Yet that in effect is what the Applicants are trying to do. Only they seek to make their case more plausible by delivering separate bills of costs for various branches of the work done, and then attempting to say the General Order does not apply to some of the bills so made out.

On the 10th of May, 1883, the solicitors gave to the corporation notice of their desire to elect under the General Order in the following terms. [His Lordship read the letter of that date above set out, and continued:—] This notice is quite general, and refers to all business, pending as well as future. As to pending business, there was, I am told, (1) business pending on

KAY, J.
1889
In re
STEWART

the 31st of December, 1882, in which work had been done since that date and before the date of the notice, which work would be covered by the scale fee; (2) also some in which work had been done which would not be covered by the scale fee, but would be allowed for separately; and (3) business pending in which nothing was done between the 31st of December, 1882, and the date of the notice, but such business was continued after the notice.

As to (1), it is admitted that the notice to elect was too late.

As to (2), it is argued that there was no "undertaking the business" between the 31st of December, 1882, and the notice; because, although work was done in the particular matter for which the solicitor could and did charge, it was not work covered by the scale fee. I disagree with this argument. The doing of that work was certainly "undertaking the business," whether it was covered by the scale fee or not; and, in my opinion, the solicitor, if this had been work under a retainer accepted after the order came into operation, would be too late in attempting to elect after he had undertaken the business by doing anything in it for which he could make a charge.

The words of clause 6 of the General Order are that "a solicitor may, before undertaking any business," elect. It is not "before undertaking that he will do," or "before undertaking to do," any business. "Undertaking any business" I understand to mean not merely accepting the retainer, but rather entering upon the work, *i.e.*, doing something in the matter for which he would be entitled to make a charge; but if he does anything for which he is entitled to charge, it seems to me impossible to say that he has not undertaken the business, whether that charge is covered by the scale fee or not.

With respect to business pending on the 31st of December, 1882, and completed afterwards, I confess it seems to me that the true view of the Order is that clause 6, giving the solicitor power to elect, does not apply at all, because in no true sense can business which was commenced before, be said to be undertaken after, that date. The solicitor, of course, could protect himself by declining to go on with the business unless his client would agree to remunerate him in some other way. Such agreement

would have to be in writing under sect. 8 of the Act of 1881. However, I have been referred to a case of *In re Love* which is not yet reported (1), in which Mr. Justice *Stirling*, following some *dicta* in *In re Field* (2), has held that clause 6 is to be read as if the words "subsequently to this Act coming into operation" were inserted before the words "before undertaking any business." Following that decision, I must hold that, where nothing was done in pending business between the 31st of December, 1882, and the 10th of May, 1883, the notice to elect was effectual.

Two other questions remain. One is whether the scale applies at all to work done for a purchaser in case of a purchase under the *Lands Clauses Consolidation Act.* The doubt arises under the 11th of the rules in Sched. I., Part I., of the General Order, which contains this provision: "In case of sales under the *Lands Clauses Consolidation Act* or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not apply." Sched. I. is referred to in the 2nd clause of the General Order, in which sales and purchases are separately mentioned, and it is provided that in respect of sales and purchases, the remuneration of the solicitor having the conduct of the business, whether for the vendor or purchaser, is to be that prescribed in Part I. of Sched. I., and to be subject to the regulations therein contained. Sched. I. provides one scale for the vendor's solicitor, and another and different one for the purchaser's solicitor. The early part of rule 11 refers to negotiating in case of a "sale or purchase," but the words which I have quoted from that rule, which are at the end of it, refer only to the case of "sales" under the *Lands Clauses Act.* Looking to the 82nd section of that Act, I have no doubt that the reference to sales only is intentional, and I think the reason is apparent. That section provides in effect that, where lands are taken compulsorily, the vendor's costs shall be borne by the purchasing company, and gives a liberal allowance of such costs, which it is the obvious purpose of this rule 11 not to interfere with. But no such reason exists for excepting the purchaser's costs, in the case of land compulsorily taken, from the operation

(1) Since reported, 40 Ch. D. 637. (2) 29 Ch. D. 608.

KAY, J.
1889
In re STEWART.

of this Order for a scale charge, and consequently the latter part of rule 11 seems to be limited, designedly and with reason, to the vendor's costs in case of a sale under compulsory powers.

The last point relates to the costs of the purchase and grant of the right or easement of laying and maintaining lines of pipes through the lands of other persons, which the corporation obtained under the powers of their special Act. In these cases no land whatever was conveyed, and the consideration seems to have been in each case a small sum of money, £5 or £10, or the like. The question is whether the scale charge in Sched. I., Part I., of the General Order applies to such a case. Clause 2 of the General Order simply speaks of sales and purchases without saying of what. But Sched. I., Part I., provides a scale for negotiating for the purchase of "property," and for investigating title to "freehold, copyhold, or leasehold property," and preparing and completing conveyance. Can the grant of an easement like this be considered a conveyance of freehold, copyhold, or leasehold property within the meaning of that schedule? I confess it seems to me difficult so to hold.

Obviously the schedule contemplates *primâ facie* conveyances of land held as freehold, copyhold, or leasehold property, and the scale is fixed upon the purchase-money which is paid when such property changes hands. When a mere easement is granted there is no change of property in that sense, and the purchase-money is comparatively trifling in amount; but it might well be that a difficult and expensive investigation of the grantor's title might in many cases be necessary, for which a scale charge, calculated on the purchase-money of the easement, would be a very inadequate compensation. It is true that the solicitor might protect himself by electing under clause 6, but I have referred to these considerations as reasons for shewing that the scale was not intended to be applicable to the mere grant of an easement, to which, according to their true construction, the words of the Order do not apply.

The result is, that I agree with the Taxing Master, except only that I must hold the notice to elect effectual as to all separate matters of conveyancing in which nothing was done between the 31st of December, 1882, and the 10th of May, 1883, but which

were completed after the latter date; and that the purchases of licenses to lay pipes are not within the General Order as to a scale charge.

The costs must follow the result, and must be set off in the usual way.

The matter was accordingly referred back to the Taxing Master with an expression of his Lordship's opinion to the above effect.

Solicitors: *Torr, Janeways, Gribble, & Oddie*, agents for *Stewart, Son, & Chalker, Wakefield; Sharpe, Parkers, Pritchard, & Sharpe*, agents for *C. J. Hudson*, Town Clerk, *Wakefield*.

C. C. M. D.

BATTEN *v.* GEDYE.

KAY, J.
1889
March 6, 25
April 13.

[1887 B. 5910.]

Parish Church — Churchyard — Churchway — Public Way — Incumbent and Churchwardens — Obstruction — Right of Action — Parishioners — Injunction — Jurisdiction — Ecclesiastical Court — High Court of Justice — "Parishioner" — Ratepayer — Rector — Freehold in Churchyard — Trespass.

The Ecclesiastical Court having full jurisdiction to entertain an action and grant relief in respect of the interference with a churchway—such as a pathway within a parish churchyard—forming an approach for the parishioners to their parish church, the High Court will not exercise jurisdiction in respect of such an interference at the suit of a parishioner.

The lay rector of a parish, in respect of his freehold property in the parish church and churchyard, can maintain an action in the High Court against a trespasser.

A person not resident in a parish but owning property within it in respect of which he pays parish rates is a "parishioner" and entitled to sue as such.

The incumbent and churchwardens of a parish church removed—but without having obtained a faculty, or the consent of the justices under 59 Geo. 3, c. 134, s. 39—certain ancient steps leading down from the churchyard to the adjoining high road. These steps had been included in the churchyard, being recessed within the churchyard wall, and they had formed one of the approaches to a path in the churchyard leading to the church door. An action was thereupon brought by four parishioners against the incumbent and churchwardens for a mandatory injunction to compel the restoration of the steps. One of these Plaintiffs was also the lay rector of the parish, but in fact sued only as a parishioner:—

Held, that the Court would not exercise jurisdiction by granting a man-

KAY, J.
1889
BATTEN
v.
GEDYE.

datory injunction, on the grounds: (1) that the steps constituted a churchway, the right to use which was solely in the parishioners, and not a footway common to the public, and the Court would not exercise jurisdiction in respect of the interference with a churchway within the churchyard at the suit of a parishioner, a jurisdiction which was vested in the Ecclesiastical Court; and (2) that, even if a mandatory injunction were granted, it might be rendered nugatory by a faculty confirming the acts of the incumbent and churchwardens.

Marriott v. *Tarpley* (1) explained.

THIS was an action against the Rev. *Nicholas Lower Gedye*, the rector or incumbent of the parish church of *Baruick*, in the county of *Somerset*, and the churchwardens of the parish, seeking a mandatory injunction to compel them to restore a flight of steps which had been removed by them, and which had led directly into the parish churchyard. These steps led upwards from the high road between *Barwick* and *Yeovil*, which passed close by the northern side of the churchyard, and ran nearly from east to west. Where it adjoined the churchyard, the road was in a cutting inclining downwards towards *Yeovil* on the west. The churchyard on that side was supported by a rough stone wall about eight or nine feet high from the roadway, and the steps were recessed within that wall, the top of them being somewhat below the general level of a pathway running east and west within the churchyard along its northern side, so that all the steps except the lower ones were actually within the churchyard itself; these lower steps projected a little into the roadway. The steps were opposite to the northern door of the church. They were closed by a gateway near the top; they did not communicate with any pathway outside the churchyard or with any way except the road above mentioned, which was a highway for carts and carriages. The other approach to the church was by the pathway in the churchyard, with which these steps communicated, and which ran eastward about fifty paces from the steps until it joined the road on a level. The steps were old, formed of rough, unhewn stones, steep and narrow, without any handrail. According to the evidence they did not project more than eighteen inches into the road, and they projected about three feet into the church path at the top, lowering

(1) 9 Sim. 279.

its level for that distance. No reliance was placed upon the projection of the steps into the roadway, and his Lordship thought they must be considered as being wholly within the soil of the churchyard. On the 17th of March, 1883, a faculty was obtained by the incumbent and churchwardens for alterations in the church, but it did not extend to the removal of these steps, which took place in or about May, 1887; the reason alleged for their removal being that they were dangerous and inconvenient because they projected into the highway, cut into and narrowed the only pathway in the churchyard, were too steep, were roughly constructed of unhewn stone, and were worn out. The writ in this action was issued in December following, and claimed a mandatory injunction as above stated, 40*s.* damages, and a declaration of the rights of the parties.

The Plaintiffs were four in number, the principal, and in fact the real, Plaintiff being *John Batten,* who, though he did not reside in the parish of *Barwick,* owned some land and sporting rights there, in respect of which he was rated for the poor about 7*s.* 6*d.* a year; and he accordingly sued as a parishioner. The other three Plaintiffs, who also sued as parishioners, were—Mrs. *Elizabeth Harbin,* the owner of most of the great tithes in the parish and also of a pew in the chancel of the parish church: *Tom William Guy,* the tenant of a farm belonging to the Plaintiff *Batten,* and part of which was within the parish of *Barwick*; and *Oliver Dalamount,* a railway porter living in a cottage within the parish. The Plaintiff *Batten* had, it appeared, undertaken to indemnify his three co-Plaintiffs against the costs of the action.

In the statement of claim the Plaintiff *Elizabeth Harbin* alleged that, besides being a parishioner, she was also "lay rector or parson" of the parish, and that the freehold of the chancel and churchyard of the parish church was vested in her, subject to the right of the parishioners to bury their dead in the churchyard and to their rights of way in and over the same; and that the Defendants had wrongfully broken into and entered her freehold. It was further alleged that the Plaintiffs, in common with all other parishioners of the parish, were entitled to a right of way up the steps and along the pathway to the church, and that the parishioners had from time immemorial

KAY, J.
1889
BATTEN
v.
GEDYE.

been accustomed, as of right, to this mode of access to their parish church.

In the statement of defence, and in answers to interrogatories, the Defendant *Gedye* claimed to be rector of *Barwick* by virtue of his institution and induction to the rectory of the parish and parish church by the Bishop, and also owner of a small portion of the great tithes by a recent exchange of part of the glebe. All the Defendants said that the parishioners had never been in the habit of using the steps, but had always been in the habit of using the other approach to the church where the pathway in the churchyard joined the high road on the level. They also stated that they had closed the opening in the churchyard wall and removed the steps in consequence of their having fallen into a ruinous and unsafe condition, and become inconvenient and dangerous to the parishioners owing to the manner in which they cut into and narrowed the pathway and projected into the highway at the foot. They also stated that the patron of the benefice, and nearly the whole of the parishioners, had signified by a memorial their approval of the removal of the steps. It appeared that no objection to the removal had been raised by the Bishop.

The action now came on for trial, its real object being to try the question of right, and to compel the restoration of the steps; it not being contended by the Plaintiffs that they had suffered any serious damage.

From the evidence it appeared that Mrs. *Harbin* had been joined as a co-Plaintiff by leave of her solicitor, but that since the commencement of the action she had stated to one of the churchwardens that she approved of the removal of the steps, did not agree with the Plaintiff *Batten* in the matter, and would take no active part in the action: also that though she had a pew in the church she seldom attended, as she did not reside in the parish. Neither she, nor *Guy*, nor *Dalamount*, gave any evidence in the action. *Dalamount*, it was deposed, had never been known to go to the parish church, and it was not until after the institution of the action that he had the curiosity to inquire where the steps formerly were. *Guy*, it was stated, had been seen at the church once since the action was brought, but not previously.

Sir *Walter Phillimore*, Q.C., *W. Blake Odgers*, and *C. Stubbs*, for the Plaintiffs:—

The Plaintiffs claim a right to use these ancient steps, not as in the nature of a highway, but as a churchway, which may properly be the subject of a private claim by any single parishioner or any number of parishioners: *Thrower's Case* (1); *Goodday* v. *Michell* (2). And the Plaintiffs having, as we submit, established their right of user, may maintain this action for infringement of that right without shewing damage, which, in fact, cannot be estimated in money. The plaintiff in an action of this nature need not be a resident parishioner: it is sufficient that he has a right to go to the church: *Jeffrey's Case* (3); *Anon.* (4); *Taylor* v. *Timson* (5). Anything which would derogate from the Plaintiffs' legal right is a good ground of action: *Harrop* v. *Hirst* (6). Here the Plaintiffs are four parishioners, and sue as such. As to the principal Plaintiff, *Batten*, though he is not a resident in the parish, he is a ratepayer, and, as such, a "parishioner": *Jeffrey's Case; Etherington* v. *Wilson* (7). The Plaintiffs *Guy* and *Dalamount* are also occupiers of property rateable in the parish. The remaining Plaintiff, Mrs. *Harbin*, is also part owner of the great tithes as lay rector, and claims the freehold of the churchyard. As rector she has a right to maintain an action for trespass to her freehold: *Jones* v. *Ellis* (8); *Watson's* Clergyman's Law (9). The Defendant *Gedye* claims to be also an owner of great tithes, and to be entitled to the freehold of the churchyard as rector of the parish and parish church. It would seem, however, that, according to the law, the freehold is in the lay rector Mrs. *Harbin: Greenslade* v. *Darby* (10); *Stewart* v. *West Derby Burial Board* (11); citing *Stephen's* Commentaries (12): but this question is really immaterial for the purposes of this case, since Mrs. *Harbin* is a parishioner, and the Defendants must shew some justification for blocking up this approach to the parish church. We submit that they cannot

(1) 3 Keble, 28.
(2) Cro. Eliz. 441.
(3) 5 Rep. 67 a.
(4) 1 Bulstr. 20.
(5) 4 Times L. R. 208.
(6) Law Rep. 4 Ex. 43.
(7) 1 Ch. D. 160.
(8) 2 Y. & J. 265.
(9) Chap. xxxix.
(10) Law Rep. 3 Q. B. 421.
(11) 34 Ch. D. 314, 333.
(12) 9th Ed. vol. ii. p. 717.

KAY, J.
1889
BATTEN
v
GEDYE.

interfere with our ancient and common way to the parish church. They have neither acquired the right by statute, 59 Geo. 3, c. 134, s. 39, nor by faculty from the Bishop: and they have not shewn any other right. An interference of this kind with a churchyard may clearly be the subject of an action in the Ecclesiastical Court; but that Court only has power to issue a monition, equivalent to an injunction, and cannot award damages or try a question of title or custom: we therefore ask for the assistance of this Court in aid of the jurisdiction of the Ecclesiastical Court: *Marriott* v. *Tarpley* (1). What we desire is a declaration of right, damages to a nominal amount, and an injunction. To sum up, we contend, (1.) That this right of approach to their parish church and churchyard is an ancient right of the parishioners: (2.) That the Defendants are not entitled to interfere with that right, whether it be ancient or modern: and (3.) That the Defendants have set up no case of faculty or statutory right.

Renshaw, Q.C., and *W. D. Rawlins*, for the Defendants:—

This action is improperly brought in this Court, because the subject of it is matter for the jurisdiction of the Ecclesiastical Court. The only case cited in favour of such an exercise of jurisdiction by this Court is *Marriott* v. *Tarpley;* but all that that case decided was that this Court will, in a proper case, grant an injunction against threatened acts in aid of the jurisdiction of the Ecclesiastical Court. If this Court were to grant a mandatory injunction, the Defendants, in order to carry out the injunction, would have to apply to the Ecclesiastical Court for a faculty, because the restoration of the steps without the authority of a faculty would be an ecclesiastical offence: *Ritchings* v. *Cordingley* (2); *Maidman* v. *Malpas* (3); *Adlam* v. *Colthurst* (4). *Thrower's Case* (5) has no application; it was a decision as to a way outside the church property, and there is a clear distinction between a path within the churchyard and a churchway, which is a way used by inhabitants of a particular house or parish over

(1) 9 Sim. 279.
(2) Law Rep. 3 A. & E. 113.
(3) 1 Hagg. Cons. 205.
(4) Law Rep. 2 A. & E. 30, 36.
(5) 1 Vent. 208; 3 Keble, 28.

the lands of others to enable them to come to church, and which is in the nature of a public highway: *Steer's* Parish Law (1). It is clear that the Ecclesiastical Courts will exercise jurisdiction in all cases of improper interference with consecrated ground: *Anon.* (2); *Walter* v. *Montague* (3). The Plaintiff *Harbin* cannot be regarded as suing in rectorial right, and can have no right of action as against the Defendant *Gedye: Griffin* v. *Dighton* (4); *Champneys* v. *Arrowsmith* (5). There is no doubt that a confirmatory faculty could be obtained in respect of the removal of these steps: *Gardner* v. *Ellis* (6).

[They referred also to 59 Geo. 3, c. 134, s. 39, *Reg.* v. *Stock* (7), and *Reg.* v. *Arkwright* (8).]

Sir *Walter Phillimore,* in reply:—

A civil right can be created and enforced over a churchyard: *Ecclesiastical Commissioners* v. *Kino* (9). The Plaintiffs have a right of way up to the church door, and their right of action must be the same, whether the path is over consecrated or unconsecrated ground.

1889. April 13. KAY, J. (after stating the main facts of the case, continued):—

One other point remains to be noticed, which is that the incumbent, though called rector, and instituted to the living by that name, was not, until recently, entitled to any of the great tithes, but he has obtained some portion of them by an exchange of a part of the glebe. The rest of the great tithes, it is said, belong to Mrs. *Harbin.* If she be the lay rector, I cannot, in the face of the evidence I have mentioned, treat this as her action. I must deal with it as the action of Mr. *Batten* in his character of parishioner.

The first defence is a plea to the jurisdiction. It is said that if a wrong has been done there is a complete remedy in the Ecclesiastical Court, and that where that is the case this Court

(1) 5th Ed. p. 45.
(2) 1 Vent. 127.
(3) 1 Curt. 253.
(4) 5 B. & S. 93.
(5) Law Rep. 2 C. P. 602; 3 C. P. 107.
(6) Ibid. 4 A. & E. 265.
(7) 8 A. & E. 405.
(8) 12 Q. B. 960.
(9) 14 Ch. D. 213.

KAY, J.
1889
BATTEN
v.
GEDYE.

should refuse to interfere. In *Thrower's Case* (1) Lord Chief Justice *Hale* said that, in the case of a common footway to a church for the parishioners, an indictment for a nuisance would not be good, but otherwise if it was a common footway and the church was only the *terminus ad quem* and it might lead further; drawing, as I understand, a distinction between a pathway outside the consecrated ground of the churchyard which might be public for anyone's use, although the church was mentioned in pleading as one terminus, and a path which was solely for the parishioners for the approach to the church, like a path within the churchyard.

In the same volume of *Ventris* (2), in an anonymous case, a prohibition was prayed on behalf of a churchwarden to the Ecclesiastical Court, for that they tendered him an oath whether any person within his parish had encroached upon the churchyard, as to which it was said that it concerned matters of freehold; but this was overruled, for they may take notice of encroachments on the churchyard.

In *Steer's* Parish Law (3) it is stated, relying on the former of these two cases, that the right to a church way, if it belongs only to the inhabitants of a particular house or parish, is maintainable in the Ecclesiastical Court; but if it be common to all, a prohibition will issue to the spiritual Court, for it is triable at common law only.

In *Quilter* v. *Newton* (4) the Court said that a prohibition should not be granted to a suit in the spiritual Court for any nuisance or other matter done in the churchyard upon a suggestion that the churchyard is a lay fee, for a nuisance there is properly of ecclesiastical conusance.

In *Adlam* v. *Colthurst* (5) the Ecclesiastical Court issued a monition at the suit of a parishioner, ordering the defendant to replace in the churchyard part of the soil of the churchyard, together with human bones, which he had improperly removed therefrom.

In *Walter* v. *Montague* (6) the rector took proceedings against the churchwardens in the Ecclesiastical Court for making a new

(1) 1 Vent. 208.
(2) Ibid. 127.
(3) 4th Ed. p. 40; 5th Ed. p. 45.
(4) Carth. 151.
(5) Law Rep. 2 A. & E. 30.
(6) 1 Curt. 253.

footpath across a part of the churchyard leading from an old footpath therein to the high road, and for taking down a part of the fence of the churchyard and putting a gate there as an entrance. Dr. *Lushington* said (1): "I apprehend that neither the rector nor the churchwardens can make a new path without a faculty from this Court. In strictness that is by law required. I think the consent of the rector is necessary by reason of his common law right; but I do not say whether or not, if the rector be called upon to shew cause, and he obstinately opposes a faculty, the Court may grant it. . . . With regard to the jurisdiction, the churchyard being consecrated ground, this Court has cognizance of the matter, and it is my duty to protect it against any unauthorised or illegal invasion whatever; and, supposing the alterations were most convenient, still the Court would not sanction them, unless the consent of the rector had been previously given, or at least asked. If this is an ancient footpath, it is competent to any individual to proceed at law: and if the question were raised here, this Court may be stopped by prohibition." The last words quoted clearly refer to a footpath across a churchyard, which is a common highway, as distinguished from a churchway simply, the right to use which is in the parishioners. The Court in that case postponed making an order to restore the former state of things until the Bishop had been consulted. But the case shews that there was ample jurisdiction in the Ecclesiastical Court to do this. I think there is no doubt that the Ecclesiastical Court has jurisdiction to order the restoration of these steps, if it should see fit to do so.

It was admitted by the Plaintiffs' counsel that, if the removal of the steps could be authorized by a faculty, a faculty could now be obtained to confirm what has been done: *Gardner* v. *Ellis* (2). But, although no authority for the doubt was cited, counsel declined to admit that a faculty could have authorized the removal of the steps. I can find no ground for such a doubt. The case of *Walter* v. *Montague* (3), which I have cited, shews that a faculty may be obtained to make a new path in a churchyard. *Hansard* v. *Parishioners of St. Matthew* (4) is another case

(1) 1 Curt. 260.
(2) Law Rep. 4 A. & E. 265.
(3) 1 Curt. 253.
(4) 4 P. D. 46.

KAY, J.
1889
BATTEN
v.
GEDYE.

to the same effect, and is valuable as shewing that a resident parishioner or ratepayer has a sufficient interest to entitle him to oppose the grant of a faculty. In this case the right is only pleaded as belonging to the parishioners and as a way to the church, so that I can see no reason why it should not be competent to grant a faculty, which they would have a *locus standi* to oppose, what has been done being, in my view, wholly within the churchyard.

There is no doubt that a rector, in respect of his freehold property in the church and churchyard, can bring an action in the High Court against a trespasser. Even a perpetual curate of an augmented chapelry has a sufficient possession to bring trespass against one who breaks into the chapel: *Jones* v. *Ellis* (1). But for the reasons I have given I am unable to treat this as an action by the rector. It is simply an action by a parishioner as such.

Another reason for which it is urged this Court should not exercise jurisdiction in the matter is that the steps, having been in fact removed, could not be restored without a faculty. This seems to be supported by the authorities of *Maidman* v. *Malpas* (2) and *Ritchings* v. *Cordingley* (3), in which, following the former case, it was held that ornaments which had been illegally placed in the church must be removed legally—that is under the sanction of the ordinary.

The decision relied upon by the Plaintiff in support of his action is *Marriott* v. *Tarpley* (4), where a churchwarden brought a suit against the vicar and the patrons, who were residents of the parish, to restrain the vicar from pulling down part of the wall of the churchyard. The vicar alleged that a gateway had formerly existed there, through which he claimed a right of way for the vicar for the time being from the vicarage house to the parish church. It was pleaded by amendment as a churchway. An interlocutory injunction had been granted, and at the hearing of the cause the question was raised whether the Ecclesiastical Court had not exclusive jurisdiction over the subject-matter of the suit. The Vice-Chancellor held it to be clear that a churchwarden might take proceedings in the Ecclesiastical Court for

(1) 2 Y. & J. 265.
(2) 1 Hagg. Cons. 205.
(3) Law Rep. 3 A. & E. 122.
(4) 9 Sim. 279.

an injury done to the wall of the churchyard while he was churchwarden, and added (1): "In my opinion this Court ought, in such a case, to be ancillary to the Ecclesiastical Court, and to grant an injunction as in other cases where any act in the nature of waste is either threatened or committed." It was admitted in argument in that case that the Ecclesiastical Court has no practice of interfering by injunction to prevent an act from being done, and all that the case decided was that, without assuming any jurisdiction to try the right, which was the function of the Ecclesiastical Court, the Court of Chancery would assist that Court by maintaining the *status quo* in the meantime. No other case has been cited, nor can I find any, in which the Courts of Common Law or Equity have exercised jurisdiction in respect of the interference with a churchway within the churchyard at the suit of a parishioner.

Reference was made to 59 Geo. 3, c. 134, s. 39, which empowers the Church-building Commissioners to alter the walls of a churchyard and to stop up any entrance or gate leading into it, and paths and passages into, through, or over the same, with the consent of two justices of the peace. It is suggested that this is now the only mode of doing so. But the statute does not affect to interfere with any jurisdiction of the Ecclesiastical Court, and it extends far beyond such jurisdiction, because it applies in terms to the case of a public path across a churchyard, over which the Ecclesiastical Court would have no power.

If this Court were to grant the mandatory injunction asked, a faculty might be obtained confirming what has been done, which this Court would have no right to prevent or interfere with.

I therefore, on the whole, think this a case in which the Court should decline to exercise jurisdiction, and I must dismiss the action; but, as the Defendants have removed the steps without the authority of a faculty and their proceeding has been irregular, I must dismiss it without costs.

Solicitors: *Rowcliffes, Rawle & Co.*, agents for *W. Marsh, Yeovil; Robbins, Billing & Co.*, agents for *Hobbs & Davies, Wells.*

(1) 9 Sim. 288.

G. I. F. C.

KAY, J.

1889

May 9.

BLAKEY v. LATHAM.

[1887 B. 1473.]

Practice—Costs—Set-off—Solicitor's Lien—Separate Actions—Appeal Costs—Rules of Supreme Court, 1883, *Order* LXV., *r.* 14.

The Plaintiff in a patent action brought a separate trade-mark action against the same Defendant. An appeal by the Plaintiff from the judgment in the patent action was dismissed with costs. Under an order in the trade-mark action certain costs in that action were ordered to be paid by the Defendant to the Plaintiff. The Defendant in the patent action having issued execution for the costs of the appeal in that action, the Plaintiff paid the same to the sheriff under protest. The Plaintiff in that action then moved, under Rules of Supreme Court, 1883, Order LXV., r. 14, that, notwithstanding a lien claimed by the Defendant's solicitor on the costs ordered to be paid by him, the Plaintiff, on the appeal, he might set off against those costs the costs ordered to be paid to him in the trade-mark action, as well as certain costs in the patent action which, prior to the appeal in that action, had been ordered to be paid to him by the Defendant:—

Held (following *Edwards* v. *Hope* (1)), that Order LXV., r. 14, applied only to costs in the same action, and not to costs in different actions; and that, accordingly, the Plaintiff's right to set off his costs in the trade-mark action against the appeal costs in the patent action was intercepted by the solicitor's lien; but that his right of set-off as to the costs in the patent action only was not so intercepted.

THIS action, which was for infringement of a patent, was dismissed with costs by Mr. Justice *Kay*, on the 26th of April, 1888. The costs of the Defendant were taxed at £992 11*s.* 4*d.* The Plaintiff appealed, and on the 19th of February, 1889, the appeal was dismissed with costs. Upon the appeal, *Thomas Lowden* and *Edward Storr Latham*, who had been partners in the Defendant firm of *Latham & Co.* (which firm had been dissolved in 1887, since the commencement of the action), appeared separately, the Defendant *Lowden* having shortly before the notice of appeal appointed Mr. *Arthur Valentine Green* as his solicitor. Immediately after the dismissal of the appeal, and on the same day, *Green* served the Plaintiff with a notice that he claimed a lien for his costs on the costs awarded to the Defendant on the appeal.

(1) 14 Q. B. D. 922.

The Defendant *Lowden's* costs of the appeal were taxed at £271 14*s.* 8*d.*

In 1886, *Blakey* had brought an action against *Latham & Co.* (*Blakey* v. *Latham* (1886 B. 5365)), for infringement of trade-mark. That action was tried before Mr. Justice *Chitty*, who, on the 8th of February, 1888, gave judgment for the Plaintiff, with costs, for an injunction and the usual account of profits. An appeal by the Defendant from that judgment was, on the 14th of May, 1888, dismissed with costs. The Plaintiff's costs of the trade-mark action and the appeal therein were taxed at £941 2*s.* 8*d.*

On the 10th of November, 1888, before the appeal in the patent action, a motion was made before Mr. Justice *Kay* by the Plaintiff in that action to set off the costs of the trade-mark action and the appeal therein against the costs due from him in the patent action. The motion was allowed, with costs, which were taxed at £48 3*s.* 6*d.*

On the 20th of December, 1888, a motion was made before Mr. Justice *Chitty*, by the Plaintiff in the trade-mark action, to commit the Defendant *Lowden* for contempt in having committed a breach of the injunction in that action, and the Defendant *Lowden*, on apologising to the Court for his contempt, was ordered to pay the costs of that motion, which were taxed at £54 11*s.* 6*d.*

On the 16th of April, 1889, the Defendant *Lowden* issued execution for his taxed costs of the appeal in the patent action, and on the same day the Plaintiff paid the amount to the sheriff under protest, at the same time giving him notice not to part with the money, as he, the Plaintiff, claimed a set-off against the costs in respect of which the execution had been issued.

The Plaintiff now moved against the Defendant *Lowden*, his solicitor *Green*, and the sheriff, for an order that the Plaintiff might be at liberty to set off against the costs of the appeal in the patent action: (1) The profits to be ascertained under the pending account in the trade-mark action; (2) the costs of the motion of the 20th of December, 1888, to commit the Defendant *Lowden* in the trade-mark action; and (3) the costs of the motion to set off made on the 10th of November, 1888, in the patent action; and for an injunction to restrain the sheriff from parting with the money in his hands.

KAY, J.
1889
BLAKEY v. LATHAM

Sidney Woolf, for the Plaintiff:—

We ask under the Rules of Supreme Court, 1883, Order LXV., rule 14, that we may be allowed a set-off for costs, notwithstanding *Green's* lien.

T. T. Fillan, and *Russell Biggs*, for the Defendant *Lowden*:—

We say, first, that there can be no set-off of costs in different Courts. Therefore, costs in the High Court cannot be set off against costs in the Court of Appeal. Secondly, the Plaintiff is too late. Execution has been issued for the amount of the costs of his appeal in the patent action, and he has paid the money. Thirdly, the Court will not allow costs in different actions to be set off to the prejudice of a solicitor's lien: *Collett* v. *Preston* (1); *Throckmorton* v. *Crowley* (2).

[KAY, J.:—The ordinary rule is that the right of set-off is not interfered with by the solicitor's lien for costs.]

That is so, where the costs are in the same action; but the rule does not apply where the costs are in different actions or matters: *Hall* v. *Ody* (3); *In re Harrald* (4); *Ex parte Griffin* (5).]

[KAY, J., referred to *Bryon* v. *Metropolitan Saloon Omnibus Company* (6); *Lee* v. *Pain* (7); *Mercer* v. *Graves* (8); *Robarts* v. *Buèe* (9); and *Morgan* and *Wurtzberg* on Costs (10).]

Waddy, Q.C., and *C. E. E. Jenkins*, for *Green*:—

It has been distinctly held by the Court of Appeal in *Edwards* v. *Hope* (11), that Order LXV., r. 14, does not apply to costs in independent actions.

G. Henderson, for the sheriff, offered to pay the money in his hands, less his costs, into a bank in the joint names of the Plaintiff's and the Defendant's solicitors, to be dealt with as the Court should direct.

(1) 15 Beav. 458.
(2) Law Rep. 3 Eq. 196, 199.
(3) 2 Bos. & P. 28.
(4) 52 L. J. (Ch.) 435; 53 L. J. (Ch.) 505.
(5) 14 Ch. D. 37.
(6) 4 Drew. 546.
(7) 4 Hare, 255.
(8) Law Rep. 7 Q. B. 499.
(9) 8 Ch. D. 198.
(10) Page 134.
(11) 14 Q. B. D. 922.

Woolf, in reply :—

[KAY, J. There is no question about your right to a set-off of costs in this action—the patent action. I only wish to hear you as to your right to set off the costs in the trade-mark action against the costs of this action. In *Edwards* v. *Hope* (1) the Court of Appeal has held, under this rule, Order LXV., rule 14, that the right to set off costs in different actions is intercepted by the solicitor's lien.]

The law as to set-off is now comprised in Order LXV., r. 14, and rule 27, sub-r. 21. The result of *Edwards* v. *Hope* is that under Order LXV., rule 14, allowing set-off is a matter for the discretion of the Court, and that the Court will not, in the exercise of its discretion, interfere with a solicitor's lien.

KAY, J. :—

The rule now is settled by Order LXV., rule 14, which is as follows: "A set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought." That gives the Court a complete discretion; but the doubt seems to have been whether that applied to costs in different actions. I do not know why it should not apply to costs in different actions. The set-off for damages must apply to different actions, because damages cannot be given to the Plaintiff and the Defendant in the same action; and therefore, as regard damages, the rule *primâ facie* means different actions, and why in the case of costs it should not also mean different actions I do not know.

If this case were absolutely free from authority I confess it seems to me difficult to see why the solicitor's lien should intercept the right. Take the simplest case one can imagine. *A.* brings an action against *B.*, and it is dismissed with costs. *B.* brings another action against *A.*, and that is dismissed with costs. The order in each case is, *A.* to pay *B.* his costs in the one action, *B.* to pay *A.* his costs in the other action. Well, when those costs are taxed and the Master's allocatur is issued, there is a judgment in each action for a definite amount, and there is no doubt

(1) 14 Q. B. D. 922.

KAY, J.
1889
BLAKEY
v.
LATHAM.

whatever that those judgments could be set off one against the other. That being so, just suppose the case (which is the only case in which the matter becomes the least material), that one of those parties, *A.*, was insolvent and unable to pay anything; why *B.* should pay costs to *A.* for the sake of *A.'s* solicitor is what I cannot understand. I cannot see how there can be any equity for that. There is no connection whatever between *A.'s* solicitor and *B.* It is said *A.'s* solicitor by his diligence has obtained this order for costs against *B.* Very well; but suppose that is so: I turn to the language of Lord Chief Justice *Cockburn* in *Mercer* v. *Graves* (1), and he says this: "The question is simply whether the defendant has or has not a right to set off his judgment against that of the plaintiff, the reason alleged in the replication that he cannot is, that the attorney for the plaintiff has a lien for his costs on the order or judgment obtained by the plaintiff, and the plaintiff is suing as trustee for his attorney. But the attorney has no such lien for costs as to be able to compel the plaintiff to bring the action on his behalf as trustee for him. In truth, as Mr. *Brown* pointed out, there is no such thing as a lien except upon something of which you have possession. The matter is thoroughly well explained in *Chitty's Archbold's* Practice (2), that although we talk of an attorney having a lien upon a judgment, it is in fact only a claim or right to ask for the intervention of the Court for his protection, when, having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs." Well, that is reasonable enough, and that is an equity against the solicitor's own client; but how can *A.'s* solicitor possibly have an equity against *B.* to make *B.* pay the costs which *B.* is ordered to pay to *A.*, when *B.* cannot recover from *A.* the costs which *A.* is ordered to pay to *B.*—how can *A.'s* solicitor have an equity to make *B.* pay instead of setting them off? If this matter were free from authority, I should say that is the most extraordinary equity I ever heard of.

However, I confess that the cases have made it very difficult to act upon that view, which seems to me the *primâ facie* view of the justice of the case. First, we have the decision of

(1) Law Rep. 7 Q. B. 499, 503. (2) 12th Ed., pp. 139, 140.

the Court of Appeal in *In re Harrald* (1), though that was before this rule, and therefore is not absolutely binding. There there was distinctly, according to the statement of the facts, an order on a petition to pay certain costs to one *Walford*, and then in a separate action *Walford* was ordered to pay other costs to the persons who had, on the petition, been directed to pay him. Then the question was whether the costs could be set off. The objection was that the solicitor had a lien, and that his lien intercepted the right of set-off; and it was so decided by Mr. Justice *Fry* and by the Court of Appeal. In the Court of Appeal it was decided, without calling upon the other side as to this point, that the right to set off was intercepted by the lien of the solicitor. So that, before this rule which gives the Court discretion, there was a right acknowledged in the Court of Chancery that the solicitor who has a lien upon the costs recovered against the other side could by that lien intercept the costs ordered to be paid to the other party.

Now has that been followed or not since these new rules came into operation? The case of *Edwards* v. *Hope* (2) is directly in point. There the Court held that, if the new rules did apply to the costs of a different action, the old equitable doctrine still prevailed that the lien of the solicitor intercepted the right of set-off. I am bound to follow that decision, and I must do so. It would be idle for an individual judge to set up his own opinion against a course of decisions which seems to have settled the matter; therefore the order in this case will be that there is the right of set-off, which is not intercepted, as to all costs in this action, but as to costs in the other action—the action before Mr. Justice *Chitty*—the right to set them off against costs in this action is not to prevail so as to interfere with any lien which the solicitor, *Green*, may be able to prove before the Taxing Master. The costs in respect of which the set-off is claimed are the costs which have been ordered to be paid by the Court of Appeal in dismissing the appeal in this action. There was a suggestion made that this Court has no jurisdiction in respect of set-off as to these costs; but that I do not follow. They are

(1) 52 L. J. (Ch.) 435; 53 L. J. (Ch.) 505. (2) 14 Q. B. D. 922.

KAY, J.
1889
BLAKEY
v.
LATHAM.

costs in the action, although they are not costs directed to be paid by the High Court, but by the Court of Appeal.

Then it was said that the right of set-off was affected by the fact that there had been an actual execution put into the hands of the sheriff, and that the costs of the appeal had been paid to the sheriff to prevent that execution being carried out: but that is putting the matter upon a very low and technical basis indeed; and I do not think that point ought to affect the order I have to make.

[His Lordship then made an order declaring that the Plaintiff was entitled to set off the £48 3*s.* 6*d.* payable by the Defendant *Lowden* to the Plaintiff, under the order in the patent action of the 10th of November, 1888, and also, but subject to the lien, if any, that on inquiry by the Taxing Master the solicitor, *Green*, might be found to have had as solicitor for the Defendant *Lowden* for costs in the patent action, the £54 11*s.* 6*d.* payable by the Defendant *Lowden* to the Plaintiff under Mr. Justice *Chitty's* order of the 20th of December, 1888, in the trade-mark action, against the £271 14*s.* 8*d.* taxed costs payable by the Plaintiff to the Defendant *Lowden* under the order of the Court of Appeal of the 19th of February, 1889. And the sheriff was ordered to pay the money in his hands, after deducting his costs of the present motion, into a bank in the joint names of the Plaintiff's and the Defendant's solicitors; and after ordering taxation, payment, and set off—of the costs of the present motion, so far as the parties had respectively succeeded thereon, it was ordered that any balance of costs due to either party under the present order should be paid out of the balance of the said joint account, so far as the same would extend; and that no proceedings should be taken against the sheriff. Liberty for any of the parties to apply in Chambers.]

Solicitors: *E. Salaman; T. Connolly; A. V. Green; Bell, Brodrick & Gray.*

G. I. F. C.

In re BOWMAN.
In re LAY.
WHYTEHEAD *v.* BOULTON.

KAY, J.
1889
May 11, 18

[1888 B. 3483.]

Will—Construction—"Surviving"—Gift in Shares to Tenants for Life and their Children—Gift over, if any Tenant for Life die without Children, to the surviving Tenants for Life and their respective Children in the same manner as their Original Shares—Absence of General Gift over if all the Tenants for Life die without Children.

A testatrix bequeathed £8000 to her nephew upon trust to invest and pay the income equally amongst her four nieces during their respective lives, and after the decease of any of them to pay the principal of her share among her children as she should appoint, and in default of appointment equally, the shares of sons to be vested interests at twenty-one, and the shares of daughters at twenty-one or marriage, with benefit of survivorship among them as to the original and accruing shares of any who should die before attaining a vested interest, and in case any of her said nieces should die without having any children who should have attained a vested interest, she gave the share of such niece and the interest thereof to her nephew upon trust "to pay and dispose thereof to or among her" (the niece's) "surviving sisters and their respective children in the same manner as I have hereinbefore directed respecting their original shares"; and she gave her residuary personal estate to her nephew. The four nieces survived the testatrix. One of them died leaving children, and two others subsequently died without issue:—

Held, that the children of the niece who first died were entitled to participate in the shares of those who died subsequently.

Previous decisions considered and their effect stated.

ORIGINATING SUMMONS.

The testatrix, *Anna Rebecca Bowman*, who died on the 3rd of September, 1839, by her will, dated in 1835, and two codicils, dated in 1839, gave her plate and linen to her four nieces, daughters of her sister Mrs. *Whytehead*, and bequeathed her personal estate to her nephew *William Whytehead* upon trust, as to £8000 thereof, to invest and pay the income equally amongst her said nieces during their respective lives, and after the decease of any of them to pay the principal of her share to or among her children as she should appoint, and in default of appointment to pay the same equally amongst such children,

KAY, J.
1889
In re BOWMAN
In re LAY.
WHYTEHEAD *v.* BOULTON

the shares of sons to be vested interests at their respective ages of twenty-one years, and the shares of daughters at their ages of twenty-one years or days of marriage, which should first happen, with benefit of survivorship among them as to the original and accruing shares of any of them who should die before attaining a vested interest, and she gave to her nephew *William* powers of advancement and maintenance in favour of her nieces' children, and continued:—"And in case any of my said nieces shall die without having any children who shall have attained a vested interest, I give the share of such niece after her decease, and also the interest thereof, to my said nephew *William*, his executors and administrators, upon trust to pay and dispose thereof to or among her surviving sisters and their respective children, in the same manner as I have hereinbefore directed respecting their original shares"; and she gave the residue of her personal estate to her nephew *William*, whom she appointed sole executor of her will.

The four nieces of the testatrix, *Jane Overton*, *Margaret Whytehead*, *Rachael Lay*, and the Defendant *Ann Boulton*, survived the testatrix. *Jane Overton* died on the 30th of April, 1882, leaving three children. *Margaret Whytehead* died on the 31st of March, 1886, without issue. *Rachael Lay* died on the 11th of January, 1889, also without issue. On the death of *Margaret Whytehead* her share was divided into three parts, and one third was paid to the children of *Jane Overton*. *William Whytehead* having died, this summons was taken out by his executors for the determination of the questions whether the payment lastly referred to was rightly made, and whether the share of *Rachael Lay* was to be divided in like manner between the surviving niece, and the children of the one who first died, or was to go altogether to the surviving niece and her children.

Levett for the Plaintiffs:—

The children of the niece who died first are entitled to participate in the shares of the nieces who subsequently died without issue. It is impossible, having regard to the general scheme of the will, to suppose that the testatrix intended the children of a niece to take or lose according as their mother

survived or predeceased their aunts. A comparison of the cases, *ex. gr.*, *Waite* v. *Littlewood* (1) and *Wake* v. *Varah* (2) on the one hand, and *Beckwith* v. *Beckwith* (3) and *In re Benn* (4) on the other hand, does, no doubt, shew that the presence or absence of a gift over if all the tenants for life die without children is, in cases of this class, an important test for determining whether children of a deceased tenant for life do or do not participate in the share of a tenant for life subsequently dying without issue; but the test is not infallible, and in the present case, although there is no such general gift over, the language of the will sufficiently indicates that the word "surviving" must be read as applicable only to the nieces, and not to their children, or as extending to survivorship by the nieces not merely in their own persons but in the persons of their children.

Percy Wheeler, for the children of the niece who first died, adopted the same arguments, and referred to *Hodge* v. *Foot* (5), *Hawkins* v. *Hamerton* (6), and *Badger* v. *Gregory* (7).

Davenport, for other parties, including the Defendant *Ann Boulton* and her children:—

The word "surviving" in this will must be read according to its literal meaning, and consequently under this gift over only the children of surviving nieces can take. The tendency of modern decisions is to give to the words "survive" and "surviving" their natural and ordinary meaning. *In re Benn* is a strong authority to that effect: see the language of Lord Justice *Cotton* at p. 844, and Lord Justice *Lindley*, at p. 846.

[KAY, J., referred to *Abbott* v. *Middleton* (8).]

Wheeler, in reply.

May 18. KAY, J. (after stating the terms of the will and the facts of the case as above set forth, continued as follows:—)

It seems almost impossible to believe that the testatrix de-

(1) Law Rep. 8 Ch. 70.
(2) 2 Ch. D. 348.
(3) 25 W. R. 282; 46 L. J. (Ch.) 97.
(4) 29 Ch. D. 839.
(5) 34 Beav. 349.
(6) 16 Sim. 410.
(7) Law Rep. 8 Eq. 78.
(8) 7 H. L. C. 68.

KAY, J.
1889
In re BOWMAN.
In re LAY.
WHYTEHEAD *v.* BOULTON.

liberately intended to exclude the children of a deceased niece from the benefit of sharing in the one fourth of another who died without issue. The general scheme is to provide for the nieces and their children by settling each share, and if any niece should die without issue, that her share should be added to the others. However, it is argued that the literal meaning of the words must be adopted, and that the literal meaning of the direction to pay and dispose of the share and the interest thereof to and among her surviving sisters and their respective children is the respective children of surviving sisters only. Does the word "surviving" in that sentence necessarily apply so as to limit the children entitled? The next following words are "in the same manner as I have hereinbefore directed respecting their original shares." This shews that the testatrix was contemplating a disposition *per stirpes*, that is, that the sisters who survived were only to take for life with remainder to their children. But why should a *stirps* be omitted when there were children of the deceased mother living? If one of the nieces had died in the lifetime of the testatrix leaving children who survived her, those children would take a share under the original limitation. Why are they to be excluded from the benefit of this gift over? If the words "pay and dispose of" can be read as contemplating an immediate payment of capital, that could only be to children whose mother was dead. But I do not think much stress can be laid on this, because "pay and dispose of" relate expressly to the share and the interest thereof, so that "pay" would be at once applicable to the interest, and, on the death of a surviving tenant for life leaving children, it would apply also to the capital, which would then be payable to her children. Another consideration which has had weight in some of the cases is that the gift over applies in case of the death of any niece without issue, and therefore in case of the death of the last surviving niece, when the words "surviving sisters" would be meaningless, unless "surviving" be read "other," or be confined to the sisters and not extended to children of sisters. But what seems to me most important is the express mention of children of nieces as objects of the gift over. The words "in the same manner, &c.," would be sufficient

to introduce the limitation to children of surviving sisters. The mention of children with surviving sisters shews that in the mind of the framer of the will children were among the principal objects of the gift over. "Surviving" is necessarily applicable to the sisters, because, as they had only life interests, no sister who did not survive could take any share, but children, without doing violence to the words, may be read children of sisters generally, not of surviving sisters only—a construction which is more consonant with the general scheme of the will.

In cases where, after similar limitations, there is a gift over on the death of all the tenants for life without leaving children or issue, it is settled by a long series of authorities that the children of a tenant for life may participate in the share of another tenant for life who died without issue after their parent: *Waite* v. *Littlewood* (1); *Wake* v. *Varah* (2); *Badger* v. *Gregory* (3).

On the other hand, if there is no gift over, and the share of the tenant for life dying without issue is expressed to be given to the survivors for their respective lives, and after their deaths to their children, only children of the survivors would take, and children of a tenant for life who died previously would be excluded: *In re Horner's Estate* (4); *In re Benn* (5).

In *Hodge* v. *Foot* (6), where there was no general gift over on failure of issue of all the tenants for life, but the share of any one dying without issue was given to the survivors and their children *per stirpes*, in the same manner as their original shares, the children of one who had predeceased were held entitled; and the same construction was adopted in *In re Walker's Estate* (7), where there was no general gift over on failure of issue of them all, but if one died without issue his share was to be in trust for the survivors in such manner and form as before declared with regard to the original shares. This last-mentioned decision seems to be in conflict with *Milsom* v. *Awdry* (8), where Sir *Richard Pepper Arden*, with great doubt and hesitation, excluded the children of a tenant for life who had previously died, under a will containing similar words.

(1) Law Rep. 8 Ch. 70.
(2) 2 Ch. D. 348.
(3) Law Rep. 8 Eq. 78.
(4) 19 Ch. D. 186.
(5) 29 Ch. D. 839.
(6) 34 Beav. 349.
(7) 12 Ch. D. 205.
(8) 5 Ves. 465.

KAY, J.
1889
In re BOWMAN.
In re LAY.
WHYTEHEAD v. BOULTON.

The authorities I have last cited are the nearest that I can find to the case now before me. The learned Judges who decided two of them recognised the tendency of modern decisions to adhere as closely as may be to a literal construction. But if there is any ambiguity it is right to adopt that possible meaning of the words which is most in conformity with the general scheme of the will, and avoids a consequence which the testator can hardly have deliberately intended.

These decisions follow a long series of authorities in which the Courts have refused to read "surviving" literally so as to exclude the children of a tenant for life who died previously. A few of these I will notice. In *Smith* v. *Osborne* (1) the testator devised land on renewable leases for lives to his daughters *E.* and *F.* as tenants in common in tail, and, in the words of the report, "if either daughter should die without issue, then to the use of the surviving daughter in tail; remainder to the use of his right heirs." One daughter died first, leaving a son, and then the other daughter died unmarried. The Lord Chancellor said that the word "surviving" must be construed "other." He continued (2): "I entirely approve of the rule now generally acted on, of giving to the word 'surviving' its ordinary and natural meaning, and not construing it to mean 'other.' Courts have no right to alter the language of a testator, merely to effect what they conjecture him to have intended to say when that is at variance with what he has in fact said. But the words of a will, after all, are but the means of expressing the testator's intention, and where the intention is plain from the words themselves, it is then the duty of the Court to execute the intention, however inartificially expressed. And here the language shews that by the word 'surviving' the testator must have meant 'other.' This is not a gift to a class, and on the death of one or more, to the survivor or survivors; but a gift to two designated devisees, that is, the testator's two daughters, as tenants in common in tail, and if either should die without issue, then to 'the surviving daughter' and the heirs of her body. Unless the word 'surviving' is to be taken here to mean 'other,' the intention cannot be carried into effect, for he means his gift over to

(1) 6 H. L. C. 375. (2) 6 H. L. C. 393.

come into operation if either of his daughters dies without issue, that is, on the death of the daughter who dies first, or of the daughter who dies last, and the latter object cannot be accomplished unless the word 'surviving' shall be so read as to be rendered capable of being applied to the predeceasing daughter. Add to which, the gift over to the testator's right heirs is only in default of 'such issue;' that is, all such issue, which includes the issue of both daughters."

The principal part, and to my mind the most cogent part, of that reasoning is independent of the argument derived from the ultimate gift. The words of this I gather are not fully given in the report. They seem to have been "and for default of such issue" or some like words.

In *Eyre* v. *Marsden* (1) the gift was, after preceding limitations, to all the testator's grandchildren living at his death equally, and if any should die before his share became payable, to his children, but if any died without leaving issue his share was to go equally amongst "my surviving grandchildren, to be paid at the same time and in the same manner as before mentioned touching the original share or shares of my said grandchildren." There was no general gift over. It was held that the children of a deceased grandchild were entitled to participate in the share of one who died subsequently without issue. So in *In re Beck's Trusts* (2) *Wood*, V.C., came to a like conclusion in a case where there was no gift over on failure of issue of all the objects.

And the cases are collected and reviewed by *Malins*, V.C., in a considered judgment in *In re Arnold's Trusts* (3), which he decided in conformity with these authorities.

I confess I am glad to find this consensus of authority in favour of my opinion. It seems to me that the decisions establish the following propositions:—

Where the gift is to *A.*, *B.*, and *C.* equally for their respective lives, and after the death of any to his children, but if any die without children to the survivors for life with remainder to their children, only children of survivors can take under the gift over.

If to similar words there is added a limitation over if all the

(1) 4 My. & Cr. 231. (2) 16 W. R. 189.
(3) Law Rep. 10 Eq. 252.

KAY, J
1889
In re BOWMAN.
In re LAY
WHYTEHEAD *v.* BOULTON.

tenants for life die without children, then the children of a predeceased tenant for life participate in the share of one who dies without children after their parent.

They also participate, although there is no general gift over, where the limitations are to *A.*, *B.*, and *C.* equally for their respective lives, and after the death of any to his children, and if any die without children to the surviving tenants for life and their respective children, in the same manner as their original shares.

Solicitors: *Ridsdale & Son*, agents for *Smithsons & Teasdale, York; Poyser & Bennetts*, agents for *H. A. Poyser, Wrexham; Long & Gardiner*, agents for *Crust, Todd, & Mills, Beverley.*

C. C. M. D.

KAY, J.
1889
May 18.

In re. CARTWRIGHT.
AVIS *v.* NEWMAN.

[1889 C. 1097.]

Waste, permissive—Tenant for Life and Remainderman—Liability of Tenant for Life.

The estate of a legal tenant for life is not liable for permissive waste.

A legal tenant for life of land, upon whom no express duty to repair was imposed by the will under which her estate was derived, died leaving the buildings upon the land in a dilapidated condition. In the administration of her estate the remainderman in fee claimed from her executor compensation by way of damages for permissive waste:—

Held, that the claim could not be sustained.

Woodhouse v. *Walker* (1) and *Yellowly* v. *Gower* (2) discussed.

ADJOURNED SUMMONS.

John Cartwright, who died in 1850, by his will, dated in that year, devised land in the county of *Suffolk* unto and to the use of his daughter *Mary Anne Cartwright* and her assigns for and during the term of her natural life, and from and immediately after her decease to the use of her children, if any, in manner therein mentioned, and if all such children should have departed this life without issue at the time of the decease of his daughter

(1) 5 Q. B. D. 404, 407. (2) 11 Ex. 274.

and on failure of her issue, he devised the land to the Defendant *Newman*, his heirs and assigns for ever. The will contained no provisions touching the liability of the testator's daughter for waste.

Mary Anne Cartwright died a spinster on the 15th of December, 1888, and the Plaintiff *Avis* was her executor. At the time of her death the buildings, gates, and fences on the devised land were in a dilapidated condition owing to the necessary repairs not having been done, and the probable cost of the works necessary to place the property in repair was estimated by a surveyor to be £166 12*s.* 9*d.* The Defendant claimed this sum from the Plaintiff, who, on the 28th of March, 1889, took out an originating summons to have it determined whether any and what sum should be allowed and paid to the Defendant as compensation in respect of waste suffered by *Mary Anne Cartwright* during her estate in the premises.

At the hearing, by the direction of the Court, the summons was amended by claiming administration of the estate of *Mary Anne Cartwright.*

Ingpen, for the Plaintiff, stated the case.

W. C. Druce, for the Defendant:—

As legal remainderman in fee the Defendant is entitled to compensation by way of damages for permissive waste by the deceased tenant for life. No doubt it is well established that equity will not interfere by injunction in cases of permissive waste by tenants for life, but the question whether or not an action for damages for permissive waste can be maintained against a tenant for life upon whom no express duty to repair is imposed by the instrument which creates the estate, rests upon a different footing, and was treated by *Lush*, J., in *Woodhouse* v. *Walker* (1) as an open question.

[KAY, J.:—Can you shew me a case in which a Court of Common Law has given damages in such an action?]

No such case can be shewn, but principle and authority are in favour of the existence of such a right of action. Before the

(1) 5 Q. B. D. 404, 407.

KAY, J.
1889
In re CARTWRIGHT.
AVIS
v.
NEWMAN

Statutes of Marlbridge (52 Hen. 3) and of *Gloucester* (6 Edw. 1, c. 8) though an action for waste lay against a tenant in dower or by the curtesy (whose estates are created by the law), it did not lie against a tenant for life or years. Those statutes were passed to remedy the mischief, and Lord *Coke* (1) treats them as extending to permissive waste, saying, "for he that suffereth a house to decay, which he ought to repaire, doth the waste"; and there are statements in the notes to *Greene* v. *Cole* (2) to the same effect.

[KAY, J.:—Lord *Coke's* words only include permissive waste where there is an obligation to repair. He says in effect that where the grantor imposes the obligation to repair, it is waste to allow the property to go out of repair.]

Lord *Coke's* meaning is that the obligation is imposed by the statutes. In *Harnett* v. *Maitland* (3) *Parke*, B. (4), referred to the notes to *Greene* v. *Cole* as an authority that by the Statute of *Gloucester* the action was given against a lessee for years. It is true that in *Gibson* v. *Wells* (5) Sir *James Mansfield*, C.J., expressed in general language the opinion that at common law an action for permissive waste was not maintainable, but that was a case of tenancy at will, and has no application to tenancy for life or years. *Herne* v. *Bembow* (6) and *Jones* v. *Hill* (7) are also usually cited as authorities to the like purport, but those three cases were commented on and explained by *Parke*, B., in delivering the judgment of the Court in *Yellowly* v. *Gower* (8), where he observed that in the first two the Court seemed to have contemplated the case only of a tenant at will, and that in the last no such proposition was stated as that a tenant for years was not liable for permissive waste; and he added "We conceive that there is no doubt of the liability of tenants for terms of years, for they are clearly put on the same footing as tenants for life, both as to voluntary and permissive waste, by Lord *Coke* (9): *Harnett* v. *Maitland*; though the degree of repairs required for a tenant from year to year, by modern decisions, is much

(1) 2 Inst. 145.
(2) 2 Wms. Saund. 251.
(3) 16 M. & W. 257.
(4) Ibid. 262.
(5) 1 B. & P. N. R. 290.
(6) 4 Taunt. 764.
(7) 7 Ibid. 392.
(8) 11 Ex. 274, 294.
(9) 1 Inst. 53.

limited." *Yellowly* v. *Gower* (1) was decided expressly on the ground that a tenant for life is liable for permissive waste, and that there is no distinction in this respect between tenant for life and tenant for years.

[KAY, J., referred to *Powys* v. *Blagrave* (2), and in particular to the statement of the Lord Chancellor (3) to the effect that in the case of a tenant for life even legal liability for permissive waste was very doubtful.]

That is a mere *dictum*, and his Lordship cites the very cases which are disapproved in *Yellowly* v. *Gower*. The recent case of *Barnes* v. *Dowling* (4) was decided on purely equitable grounds, having no reference to the right of a legal remainderman in fee to maintain an action for waste. Still more recently in *Davies* v. *Davies* (5) *Kekewich*, J., has followed *Yellowly* v. *Gower*, and expressly held that a tenant for years is liable for permissive waste.

[He referred also to *Bacon* v. *Smith* (6), *Tudor's* Leading Cases (Real Property) (7), and 3 & 4 Will. 4, c. 42, s. 2.]

KAY, J. (without calling upon counsel for the Plaintiff):—

I am much obliged to you, Mr. *Druce*, for your argument, to which I have listened with very considerable interest. The result appears to be this: Sir *James Mansfield* was clearly of opinion that an action for permissive waste would not lie even against a tenant for years. That is clearly shewn in the case of *Gibson* v. *Wells* (8), which was followed at later dates in *Herne* v. *Bembow* (9) and *Jones* v. *Hill* (10), and in the recent case of *Barnes* v. *Dowling* in the *Law Times* reports; and when the point was brought before the Lord Chancellor (Lord *Cranworth*) in the case of *Powys* v. *Blagrave*, his Lordship (11) said this: "Then it was argued, independently of the trust, that it is the duty of a tenant for life to repair—'*Equitas sequitur legem.*' But even legal liability

(1) 11 Ex. 274.
(2) 4 D. M. & G. 448.
(3) Ibid. 458.
(4) 44 L. T. (N.S.) 809.
(5) 38 Ch. D. 499.
(6) 1 Q. B. 345.
(7) 3rd Ed., pp. 109, 110.
(8) 1 B. & P. N. R. 290.
(9) 4 Taunt. 764.
(10) 7 Ibid. 392.
(11) 4 D. M. & G. 458.

KAY, J.
1889
In re CARTWRIGHT. AVIS *v.* NEWMAN.

now is very doubtful." And he referred to *Gibson* v. *Wells* (1), and *Herne* v. *Bembow* (2). His Lordship there decided most certainly that in equity no interference whatever would be made on the ground of permissive waste by a tenant for life. Now, in that state of the authorities, this consideration is to be added. Since the Statutes of *Marlbridge* and of *Gloucester* there must have been hundreds of thousands of tenants for life who have died leaving their estates in a condition of great dilapidation. Not once, so far as legal records go, have damages been recovered against the estate of a tenant for life on that ground. To ask me in that state of the authorities to hold that a tenant for life is liable for permissive waste to a remainderman is to my mind a proposition altogether startling. I should not think of coming to such a decision without direct authority upon the point. Such authority as there is seems to me to be against the contention, and in opposition to the positive decisions in *Gibson* v. *Wells*, *Herne* v. *Bembow*, and *Jones* v. *Hill* (3), there are only to be found certain *dicta* of Baron *Parke* and the late Lord Justice *Lush* which seem to amount to this, that the words of the Statutes of *Marlbridge* and *Gloucester* are sufficient to include the case of permissive waste, at any rate where there is an obligation on the person who has the particular estate not to permit waste, whether that obligation does or does not exist at the common law in the case of a tenant for life. But at the present day it would certainly require either an Act of Parliament or a very deliberate decision of a Court of great authority to establish the law that a tenant for life is liable to a remainderman in case he should have permitted the buildings on the land to fall into a state of dilapidation. I therefore think that this claim must be disallowed.

Solicitors: *Rodgers & Clarkson; Druces & Attlee.*

(1) 1 B. & P. N. R. 290. (2) 4 Taunt. 764.
(3) 7 Taunt. 392.

C. C. M. D.

EARDLEY *v.* KNIGHT.

KAY J,
1889
May 31.

[1885 E. 1554.]

Practice—Mortgagor and Mortgagee—Foreclosure—Accounts—Costs—Adding Costs to Security—Interest on Costs.

A mortgagee is not entitled, in carrying in his accounts under a foreclosure judgment, to charge interest on his taxed costs unless they are directed to be added to his security, and then they carry interest from the date of the Taxing Master's certificate, and not from the date of the judgment.

An action by a mortgagor against a mortgagee to set aside the mortgage having been dismissed with costs, which were ordered to be paid by the Plaintiff to the Defendant, judgment was given for foreclosure on the Defendant's counterclaim, and an account was directed of what was due to the Defendant for principal, interest (the mortgage reserving 5 per cent.), and the taxed costs of the action. On appeal the judgment was affirmed with costs, the Court of Appeal giving the Defendant leave to add the taxed costs of the appeal to his security.

In carrying in his accounts the Defendant charged the Plaintiff with interest at 4 per cent. on the taxed costs under the original judgment from the date of the judgment, and also interest at 4 per cent. on the taxed costs of the appeal from the date of the judgment of the Court of Appeal:—

Held, that no interest on the costs under the original judgment could be charged by the Defendant, the mortgagee; but that, as to the costs of the appeal, interest at 4 per cent. was chargeable, though only from the date of the Taxing Master's certificate, and not from the date of the judgment of the Court of Appeal.

Lippard v. *Ricketts* (1) considered.

THIS was an action by a mortgagor of certain real estate against the mortgagees, who were in possession, to set aside the mortgage on the ground of fraud, or for redemption. The Defendants counterclaimed for foreclosure. At the trial on the 3rd of May, 1887, the action was dismissed with costs, which were ordered to be paid by the Plaintiff to the Defendants; and upon the counterclaim the Court ordered an account of what was due to the Defendants under their mortgage security for principal and interest (the rate reserved by the mortgage being 5 per cent.),

(1) Law Rep. 14 Eq. 291.

KAY, J.
1889
EARDLEY
v.
KNIGHT.

and for their taxed costs of the action; also an account of rents and profits received by the Defendants, or which without their wilful default might have been so received, such amount to be deducted from the amount found due under the mortgage: and the usual judgment for foreclosure was given, in case of the Plaintiff making default in payment of the balance of the mortgage debt within six months from the Chief Clerk's certificate. The Plaintiff appealed from that judgment, and on the 12th of May, 1888, the Court of Appeal affirmed the judgment, and, after ordering taxation of the costs of the appeal, ordered the Plaintiff to pay such taxed costs to the Defendants, and gave the Defendants liberty to add any costs remaining unpaid by the Plaintiff to their mortgage security.

By his certificates, both dated the 10th of August, 1888, the Taxing Master certified the taxed costs under the judgment of the 3rd of May, 1887, at £518 2*s.* 7*d.*, and the taxed costs of the appeal at £68 4*s.* 4*d.*

In their accounts carried in under the judgment the mortgagees charged the mortgagor with interest at 4 per cent. per annum on the £518 2*s.* 7*d.* from the 3rd of May, 1887, the date of the judgment, and also with interest at the same rate on the £68 4*s.* 4*d.* from the 12th of May, 1888, the date of the order of the Court of Appeal; and in his certificate, dated the 4th of April, 1889, the Chief Clerk allowed the interest so charged in both cases.

The Plaintiff then took out this summons to vary the certificate by disallowing (amongst other items) the amounts so certified to be due for interest on costs.

Dunham, for the Plaintiff:—

I submit that a mortgagee is not entitled to more than his principal, interest, and costs, and cannot charge interest on his costs. If interest is allowed on costs at all it ought to be calculated, not from the date of the judgment, but from the date of the Taxing Master's certificate.

Under 1 & 2 Vict. c. 110, ss. 17 & 18, interest was first allowed on a judgment debt, which included costs; but that rule was held to apply only where costs were payable from one party to

another, not where the costs were ordered to be paid out of a fund: *Attorney-General* v. *Nethercote* (1).

In *Lippard* v. *Ricketts* (2) it was held, for the first time, that, independently of the statute, interest was allowable on costs which were charged on or added to a mortgagee's security, but only from the date of the Taxing Master's certificate, and not from the date of the judgment. Since the Rules of the Supreme Court, 1883, there have been decisions at common law, though not in the Chancery Division, that by virtue of those rules interest on costs under the statute is to be calculated from the date of the judgment, as in *Pyman & Co.* v. *Burt* (3). But those decisions relate only to interest on costs under the statute where such costs are ordered by the particular judgment or order to be paid by one person to another.

There is no authority for allowing interest on a mortgagee's costs not added to the security: if they are so added they carry interest from the date of the certificate only.

Vernon R. Smith, for the Defendants:—

In *Lippard* v. *Ricketts*, *Bacon*, V.C., seems to have considered that interest is payable on a mortgagee's costs.

[KAY, J.:—Surely that cannot be right. If, in taking the ordinary mortgagee's accounts, interest can be charged on costs, then every judgment for foreclosure will carry interest on costs. To entitle you to interest on your costs, you must shew that the costs are charged on the mortgaged estate.]

The costs of the appeal are, at any rate, so charged, for they are added to the security by the order of the Court of Appeal.

KAY, J.:—

As regards the costs under the original judgment, I do not think that the interest on those costs should be charged against the estate. If they could be so charged, I cannot conceive of a single case of an action for foreclosure in which the costs would not carry interest.

(1) 11 Sim. 529. (2) Law Rep. 14 Eq. 291.
(3) W. N. 1884, p. 100.

KAY, J.
1889
EARDLEY
v.
KNIGHT.

Here an action was brought by the Plaintiff, a mortgagor, against his mortgagees to set aside the mortgage. That action was dismissed with costs, which were ordered to be paid by the Plaintiff to the Defendants; and then, on the counter-claim, the usual foreclosure decree was made, and an account directed of what was due to the Defendants under the mortgage. Then they brought into that mortgage account the costs of the original action. That was right, as they were the costs of mortgagees defending their security, and, as I understand, there was no objection made to that, and accordingly those costs have been allowed. But then the Defendants claim interest on those costs, that is to say, on costs in a foreclosure action. For that I find no principle or authority. If that were allowed the result would be that in every case of foreclosure the mortgagor could not redeem until payment, not only of principal, interest, and costs, but also of interest on the costs. I never heard of any such rule.

But then it is said there has been a decision at Common Law which may support the view that, so far as this action was dismissed with costs, those costs should carry interest. That might be so if the costs were charged on the estate: but it does not follow that because the action has been dismissed with costs, the costs are a charge on the estate. Under the terms of the judgment the costs must be got from the mortgagor personally; they are not charged on the estate.

Then the judgment was the subject of appeal, and the appeal was dismissed with costs, the order of the Court of Appeal directing that the costs of the appeal should be paid by the Plaintiff to the Defendants, and that the costs remaining unpaid by the Plaintiff might be added by the Defendants to their security.

Adding the costs to the security is, of course, adding them to the capital moneys and treating them as charged on the estate; and I have the authority of *Lippard* v. *Ricketts* (1) as a decision that where costs are directed to be added to moneys secured by a deed and to stand charged upon the property comprised in the deed, the costs carry interest at 4 per cent. Adding the costs to the security is essentially the same thing as directing them to be charged on the estate, and therefore I hold that the costs carry

(1) Law Rep. 14 Eq. 291.

interest at 4 per cent. from the date of the Taxing Master's certificate. That applies only to the costs of the appeal: interest on the costs under the original judgment I disallow altogether, for I am certainly not going to extend the decision in *Lippard* v. *Ricketts* (1). Instead of referring the matter back to the Chief Clerk, I will now make an order varying his certificate accordingly.

Solicitors: *H. Tyrrell & Son; G. H. Carthew,* agent for *A. Ellis, Burslem.*

(1) Law Rep. 14 Eq. 291.

G. I. F. C.

CHITTY, J.
1889
April 30.

In re BURLAND'S TRADE-MARK. BURLAND *v.* BROXBURN OIL COMPANY.

[1889 B. 1541.]

Practice—Service out of Jurisdiction—Injunction—Sequestration—Rules of Supreme Court, 1883, *Order* XI., *r.* 1, *sub-s.* (*f*), *r.* 2.

In an action to restrain the infringement of the Plaintiff's registered trade-mark, the Defendants being a company having their registered office at *Glasgow*, with branches in *London*, *Manchester*, and *Hull*, leave to serve the writ out of the jurisdiction was given, as an injunction could be enforced by sequestration against the property of the company in *England*.

Marshall v. *Marshall* (1) discussed and distinguished.

MOTION.

This action was commenced to restrain the infringement of the Plaintiff's registered trade-mark.

The Defendants were a company having their registered office at *Glasgow*, and branches in *London*, *Manchester*, and *Hull*, which last place was within a short distance of the Plaintiff's place of business.

The Plaintiff, by his affidavits, stated that the Defendants were supplying the goods of which he complained as infringing his trade-mark from their places of business at *Manchester* and *Hull*, and proved the execution from *Manchester* of an order given by one of his own customers. He further stated that it would be necessary to call in support of his case a considerable number of witnesses, all of whom were resident in *England*.

Under the above circumstances the Plaintiff, on the 9th of April, moved *ex parte* to serve the writ in the action in *Scotland*, and leave was given accordingly (2).

This was a motion on behalf of the Defendants to discharge the order.

Romer, Q.C., and *Carpmael*, in support of the motion:—

The defendant company has its registered office out of the

(1) 38 Ch. D. 330. (2) Weekly Notes, 1889, p. 79.

jurisdiction, and is not amenable to the ordinary process of the Court. *Marshall* v. *Marshall* (1) decides that in a case like this there is no reason for withdrawing it from the Scotch Courts.

John Cutler, for the Plaintiff:—

This case is distinguishable from *Marshall* v. *Marshall*, as in that case if an injunction had been granted by an English Court it could not have been enforced against the defendant himself, but only against his servants and agents in *England*, whereas if in the present case an injunction were obtained it could be enforced by sequestration against the property of the company in *England*. *Tozier* v. *Hawkins* (2) shews that no hard and fast line is laid down by *Marshall* v. *Marshall*.

Romer, in reply.

CHITTY, J.:—

The main object of the action is to obtain an injunction. The wrong complained of is an infringement of the Plaintiff's trade-mark registered in *England*, and the thing sought to be restrained is selling in *England* what the Plaintiff alleges are articles infringing his English trade-mark. The case, therefore, on the mere question of jurisdiction, falls within Order XI., rule 1, and the only point to be considered is a question of discretion, namely, the proper exercise of the judicial discretion under the 2nd rule of the same Order.

The additional facts are these: the Defendants are a Scotch corporation registered under the Companies Act of 1862, and their head office is in *Scotland*; consequently it may be rightly termed a domiciled Scotch corporation; it, however, has several places of business in this country, at *Newcastle*, at *Manchester*, and at *Hull*, and on the circular which I have before me the offices at *Manchester* and *Newcastle* are referred to, as well also as one which is not mentioned in the evidence, in *London*; it is plain that the Defendants are carrying on a considerable business in this country, and that they are selling here in this country,

(1) 38 Ch. D. 330. (2) 15 Q. B. D. 680.

CHITTY, J.
1889
In re BURLAND'S TRADE-MARK.
BURLAND v. BROXBURN OIL COMPANY.

and therefore within the jurisdiction, those articles which the Plaintiff says are an infringement of his trade-mark. As an instance of the mode in which the Defendants carry on their business the Plaintiff swears, and there is no denial of the fact, that, an English customer of his sent an order to the Defendants' head office, which is in *Glasgow*, and the order was executed through the Defendants' English office in *Manchester*; I have the letter before me. Now, in these circumstances, would it be right to discharge the order which has been made? I think not, and I think the facts which I have stated shew that it would be more convenient that the action should proceed here, because the wrong has been done here. The business which the Plaintiff complains of is being done here, and it appears to me, if the test of convenience is the mode of enforcing the order, that if the Plaintiff should succeed in obtaining an injunction it can be well enforced in this country. The Defendants being a corporation, of course, if an injunction were granted and disobeyed, the regular mode of procedure would be by sequestration. After what I have said with regard to the business, which seems to be of a somewhat considerable character, carried on by the Defendants in this country, it appears that an injunction can be effectually enforced in this country.

Mr. *Romer* referred to the case of *Marshall* v. *Marshall* (1) which was before the Court of Appeal last year, but that case was an entirely different one. The plaintiffs and the defendants there were persons carrying on business in *Glasgow*. The defendant was selling, as is stated in the report of the case, in *England* the articles complained of, but the plaintiff does not appear to have had any regular business in this country. On the contrary, the only statement in the report is—and Mr. *Cutler* tells me that he has looked at the affidavits and examined them, and it appears that the statement is quite correct—the only statement that the plaintiff could make with regard to his carrying on business within the jurisdiction was that he was extending his business in *England*. Now the case was eminently a Scotch case, and there was no reason, as Lord Justice *Cotton* said, for "withdrawing the case from the Scotch Courts." The Lord Justice pointed out

(1) 38 Ch. D. 330.

that if the injunction were granted the Court could not enforce the injunction against the defendant, who was a private person and not a corporation, and he points out that it would be inconvenient merely to proceed against the servants and the agents. The right mode of proceeding by attachment, speaking as a general rule, is against the offending party himself. But that reason does not apply to the facts before me, because, as I have already pointed out, the right mode of proceeding against a corporation is by sequestration.

The other case that was mentioned was *Tozier* v. *Hawkins* (1), also a decision of the Court of Appeal. That shews, what indeed is not disputed in this case, that there is jurisdiction to make such an order as has been made already, namely, the order sought to be discharged, and the Master of the Rolls, in giving judgment, seemed to think that the objection that the injunction could not be enforced was not sufficient in the case before him, because, as he observed, there was no affidavit that the defendant never came to *England*. I take that observation to mean that if the defendant, who was an Irishman, was shewn to be in the habit of coming to *England*, then of course he could be reached by means of the injunction; if he had been altogether living in *Ireland* the case might have been different; but on the facts in this case (perhaps I am almost repeating) I think an injunction, if granted, could be effectually enforced here. For these reasons I think that the decision of *Marshall* v. *Marshall* (2) does not apply, and that I ought to maintain the order, which I may say was not made without some consideration, because I am always careful in these cases to look into the facts. There is one circumstance which perhaps I have omitted to mention, and that is the balance of convenience with reference to the witnesses. The Plaintiff's witnesses, according to the affidavits, are all here. The acts of infringement which have been committed in this country must be proved or disproved by witnesses here. Therefore we have the Plaintiff's witnesses in this country, and that is sworn to; and as to the Defendants' witnesses, some of them may be in *Scotland*, but if the Defendants dispute the infringements, as it is possible they may, then some of the Defendants' witnesses must also be

(1) 15 Q. B. D. 680. (2) 38 Ch. D. 330.

CHITTY, J.

1889

In re BURLAND'S TRADE-MARK

BURLAND *v.* BROXBURN OIL COMPANY.

within the jurisdiction here. The result is that I think, when all the facts are considered, that this is an English case and not a Scotch case. I therefore refuse the motion with the usual consequences.

Solicitors: *Wilson, Bristows, & Carpmael; Torr, Janeways, Gribble & Oddie.*

G. M.

Ex parte SCHOOL BOARD FOR LONDON. *In re* HART.

NORTH, J.
1889
April 8.

Copyholds—Estate Tail—Effect of Enfranchisement in barring Entail.

The tenant in tail in possession of copyhold land (held of a manor by the custom of which an entail could be created) devised all the real estate of or to which he should be seised or entitled at the time of his death to two trustees, their heirs and assigns, upon certain trusts declared by the will. After the death of the testator the trustees were, as such devisees, admitted tenants of the copyhold land, to hold the same to them, their heirs and assigns, upon the trusts of the will. The lord of the manor afterwards executed an enfranchisement (not under the *Copyhold Acts*) to the trustees, and they executed a conveyance to the only daughter of the testator (who was his heiress in tail) in fee. Under the trusts of the will the daughter had become solely beneficially entitled to the real estate which passed under the devise to the trustees:—

Held, on the authority of *Challoner* v. *Murhall* (1) and *Dunn* v. *Green* (2), that the effect of the enfranchisement, and the subsequent conveyance by the trustees, was to bar the entail, and make the daughter owner of the land in fee simple.

PETITION for the payment out of Court to the Petitioner of a sum of £1771, which had been paid in by the School Board for *London* as the purchase-money of some land at *Stoke Newington*, taken by them under their compulsory powers.

The land was formerly copyhold, holden of the manor of *Stoke Newington*, but it had been enfranchised.

According to the custom of the manor lands holden of it could be entailed.

On the 27th of May, 1802, *Sarah Ann Cotton* was admitted tenant to the land, and immediately thereupon she surrendered the same to the use of herself for life, with remainder to the use of all and every her child and children, as she should by deed or will appoint, with remainder, in default of such appointment, to the use of her first and other sons successively in tail, with remainders over. *Sarah Ann Cotton* died without having exercised the power of appointment, and her grandson, *W. C. Cotton*, who was the only son and heir in tail of *T. D. Cotton*, her first son,

(1) 2 Ves. 524. (2) 3 P. Wms. 9.

NORTH, J.
1889
Ex parte SCHOOL BOARD FOR LONDON.
In re HART.

was, on the 21st of November, 1843, admitted tenant to the land according to the custom of the manor. *W. C. Cotton* was then an infant, but he afterwards attained twenty-one, and died on the 20th of June, 1860, having by his will, dated the 10th of January, 1860, devised all the real estate of or to which he should be seised or entitled at the time of his death to *J. Holme* and *W. Tattersall*, their heirs and assigns, upon certain trusts therein declared.

On the 12th of February, 1863, *Holme* and *Tattersall* were, as such devisees, admitted tenants to the copyhold land, to hold the same unto them, their heirs and assigns, upon the trusts of the will. By a deed dated the 10th of July, 1876, the lords of the manor granted and enfranchised the land unto and to the use of *Holme* and *Tattersall*, their heirs and assigns, for ever, to be holden in free and common socage discharged of the copyhold tenure and all the incidents thereof. The enfranchisement was not made under the *Copyhold Acts*. Under the trusts of the will of *W. C. Cotton*, his only child and heiress in tail, *Elizabeth Maria Procter*, the wife of *Gilbert Procter*, became solely and beneficially entitled to all the real estate which passed by the devise contained in her father's will. By a deed dated the 21st of September, 1876, and made between *Holme* and *Tattersall* of the first part, Mr. and Mrs. *Procter* of the second part, and *H. A. Gregg* of the third part, after a recital that the above-mentioned enfranchisement was made by *Holme* and *Tattersall* at the request of Mr. and Mrs. *Procter*, and that the consideration money for the same was paid out of the moneys of Mr. and Mrs. *Procter*, *Holme* and *Tattersall*, at the request and by the direction of Mr. and Mrs. *Procter*, granted, released, and conveyed the land to *Gregg* and his heirs, to the use of Mrs. *Procter*, her heirs and assigns, for ever. *Andrew Hart*, the present Petitioner, afterwards purchased the land from a person who had purchased it from Mrs. *Procter*, and it was conveyed to him in fee. The Petitioner alleged that the effect of the enfranchisement and the conveyance of the 21st of September, 1876, was to bar the entail in the land, and to make Mrs. *Procter* absolute owner of it in fee simple as of freehold tenure. The School Board contended that the estate tail was not barred, and that consequently the Petitioner was not

absolutely entitled to the purchase-money. This was the only objection raised to the Petitioner's title.

On the 27th of December, 1888, the School Board paid the purchase-money into Court, and executed a deed-poll, under the provisions of sect. 77 of the *Lands Clauses Consolidation Act*, 1845, vesting the land in themselves absolutely in fee simple in possession, free from incumbrances.

Cozens-Hardy, Q.C., and *Dauncy*, for the Petitioner:—

By virtue of the deed of enfranchisement and the subsequent conveyance by the trustees to Mrs. *Procter* the estate tail was barred, and she became entitled in fee. An estate tail in copyholds may be barred by a deed of enfranchisement; the effect of the enfranchisement is to merge the copyhold estate in the lord's freehold: *Challoner* v. *Murhall* (1). Even if the trustees were not competent to receive enfranchisement, they acquired the lord's freehold and conveyed it to Mrs. *Procter*, and the effect is the same as if the lord had conveyed it to her: *Wilson* v. *Allen* (2).

That an enfranchisement to the tenant in tail will bar an entail of copyhold is stated in *Scriven* on Copyholds (3) and in *Watkins* on Copyholds (4).

At any rate the Petitioner has acquired a title by possession for more than twelve years; he must be deemed to be lawfully entitled until the contrary is shewn.

P. V. Smith, for the School Board:—

In Mr. *Coventry's* note to *Watkins* on Copyholds (4) doubt is expressed as to the accuracy of the proposition stated in the text. He says: "in equity, it is submitted, the tenure only is considered to be changed—the estates of the parties remaining as they existed in the copyhold tenure before enfranchisement . . . it is scarcely correct to class a grant of the freehold among the means of barring an entail in copyholds; for in fact it does not bar the entail in equity—an equitable recovery after enfranchisement being a necessary, or at least a prudent assurance to effectuate that

(1) 2 Ves. 524.
(2) 1 Jac. & W. 611, 620, 622.
(3) 6th Ed. pp. 46, 283.
(4) 4th Ed. p. 236.

NORTH, J.
1889
Ex parte SCHOOL BOARD FOR LONDON.
In re HART.

object." And this view is more fully enforced in another note at p. 438, and is supported by *Taylor* v. *Shaw* (1); *Bernard* v. *Simpson* (2); *Wynne* v. *Cookes* (3). In *Challoner* v. *Murhall* (4) the enfranchisement was made to the tenant for life, but the decision was professedly founded upon *Parker* v. *Turner* (5), and a note to the report of that case (6) states that a fine was levied after the conveyance of the freehold to the tenant in tail, and that it was "objected that a fine having been levied the supposed entail was barred and extinguished." There must be something active on the part of the tenant in tail to bar an entail: *Margaret Podgers' Case* (7). I admit that the decision in *Dunn* v. *Green* (8) is opposed to my argument, but it is founded on the fallacious reasoning that, if the entail of the copyhold be not barred by a grant of the freehold, "it will be a perpetuity, since the only proper way of barring the entail of a copyhold is by recovery in the lord's court; but after such severance" from the manor "as in the present case, no recovery can be suffered in the lord's court." The entail could, of course, be afterwards barred in the same way as any other equitable entail in freehold land.

As to the point on the *Statute of Limitations*, the claim is made through a tenant-in-tail who is not shewn to be dead. So long as she is alive there is no adverse possession.

Cozens-Hardy, Q.C., referred to *Scriven* on Copyholds (9).

NORTH, J.:—

Whatever might be the result if the person to whom the enfranchisement was made had been a tenant for life, I think it is clear that when he is the tenant in tail in possession the enfranchisement has the effect of barring the entail. *Challoner* v. *Murhall* and *Dunn* v. *Green* seem to me clear authorities on the point, and the criticisms which have been made on them, founded on reports which are not very clear, would not justify me in depart-

(1) Cart. Rep. 6, 22.
(2) Clay. Rep. 138.
(3) 1 Bro. C. C. 515.
(4) 2 Ves. 524.
(5) 1 Vern. 393, 458.
(6) Ibid. 458.
(7) 9 Rep. 104 a, 106 b.
(8) 3 P. Wms. 9.
(9) 4th Ed. p. 555.

ing from them, especially as they are of such long standing. The law is clearly laid down in that way in *Scriven* on Copyholds (1), and also in *Watkins* on Copyholds, and the only doubt which has been thrown upon it is in the notes by Mr. *Coventry* to *Watkins* on Copyholds (2). Mr. *Coventry* was a conveyancer of great experience, but he only suggests a doubt, and I cannot upon the authority of those notes overrule the law laid down in *Challoner* v. *Murhall* (3) and *Dunn* v. *Green* (4). In *Challoner* v. *Murhall*, though the deed of enfranchisement was to the tenant for life, he did not dispose of the property by his will, but it descended to a person who was both his heir of the freehold interest and also the tenant in tail under the limitations in tail of the copyhold interest, and therefore the effect was in substance the same as if the enfranchisement had been made directly to the tenant in tail. It is said that the note to *Parker* v. *Turner* (5) shews that the decision there was based upon the operation of a fine, but I think the note only shews that there was another ground besides the merger of the copyhold interest in the freehold on which the decision might have been supported. I must follow the other cases. I hold, therefore, that the Petitioner has made out his title to the fund in Court.

Solicitors: *W. Beck; Gedge, Kirby, & Millett.*

(1) 4th Ed. p. 555.
(2) 4th Ed. pp. 236, 438.
(3) 2 Ves. 524.
(4) 3 P. Wms. 9.
(3) 1 Vern. 458.

W. L. C.

NORTH, J.

1889

March 30; *April* 4, 9.

In re DEAN.
COOPER-DEAN *v.* STEVENS.

[1888 D. 2183.]

Will—Construction—Trust for Benefit of Specified Animals—Validity—Gift on trust or beneficially.

A trust for the maintenance of horses and dogs so long as they shall live is not a perpetuity.

A testator devised his freehold estates, subject to and charged (*inter alia*) with an annuity of £750 thereinafter mentioned to his trustees, and to a term of fifty years thereinafter granted to them, to the use of the Plaintiff for life, with remainder to the use of his first and other sons successively in tail male. And he gave to his trustees his eight horses and ponies and also his hounds. And he charged his freehold estates thereinbefore devised with the payment to his trustees, for the term of fifty years commencing from his death, if any of the said horses and hounds should so long live, of an annual sum of £750. And he declared that his trustees should apply the said annual sum in the maintenance of the horses and hounds for the time being living, and in maintaining the stables, kennels and buildings inhabited by the said animals in such condition of repair as his trustees might deem fit; but this condition should not imply any obligation on his trustees to leave the said stables, kennels and buildings in a state of repair at the determination of the term; but he declared that his trustees should not be bound to render any account of the application or expenditure of the sum of £750, and any part thereof remaining unapplied should be dealt with by them at their sole discretion. And in consideration of the maintenance of his horses, ponies, and hounds being a charge upon his said estate as aforesaid, he gave all his personal estate not otherwise disposed of to the Plaintiff absolutely.

Held, that the £750 annuity was not given to the trustees beneficially, but that a trust was created for the maintenance of the animals, and that such a trust was valid, although it was not a charity, and its execution could not be enforced by any one.

Mitford v. *Reynolds* (1) discussed and explained.

Held also, that the surplus of the £750 not employed in the maintenance of the animals belonged either to the devisee of the freehold estates or to the testator's heir-at-law.

WILLIAM CLAPCOTT DEAN, by his will dated the 12th of November, 1887, divided all his freehold estates, subject to and charged with certain annuities and with an annuity of £750, thereinafter mentioned to his trustees, and to a term of fifty

(1) 16 Sim. 105.

years thereinafter granted to his trustees, to the use of his trustees, for the term of one year from the day preceding his death, upon certain trusts, and, subject thereto, to the use of *James Cooper* (the Plaintiff) for his life, with remainder to the use of the Plaintiff's first and other sons successively in tail male, with remainders over. The will continued: "I give to my trustees my eight horses and ponies (excluding cart horses) at *Littledown*, and also my hounds in the kennels there. And I charge my said freehold estates hereinbefore demised and devised, in priority to all other charges created by this my will, with the payment to my trustees for the term of fifty years commencing from my death, if any of the said horses and hounds shall so long live, of an annual sum of £750. And I declare that my trustees shall apply the said annual sum payable to them under this clause in the maintenance of the said horses and hounds for the time being living, and in maintaining the stables, kennels, and buildings now inhabited by the said animals in such condition of repair as my trustees may deem fit; but this condition shall not imply any obligation on my trustees to leave the said stables, kennels and buildings in a state of repair at the determination of the said term; but I declare that my trustees shall not be bound to render any account of the application or expenditure of the said sum of £750, and any part thereof remaining unapplied shall be dealt with by them at their sole discretion. And my will is that, so long as there shall remain any of my said horses, ponies and hounds living, they shall be kept in the stables, kennels and buildings which they now occupy. And I empower my trustees to recover payment of the said sum of £750 by distress and entry upon and receipt of the rents and profits of the lands so charged therewith as aforesaid, or any part thereof, when in arrear for twenty-one days. I declare that the said horses and ponies shall not be worked after my death, but may at all times be exercised on my freehold property at the discretion and direction of my trustees, and that neither they nor the said hounds shall be sold, but that the latter may be used by the person for the time being entitled to the possession of the settled hereditaments. I direct that whenever my trustees shall consider that one or any of the said horses and

NORTH, J.
1889
In re DEAN.
COOPER-DEAN v. STEVENS.

ponies should be killed, the same shall be shot with a double-barrelled gun, both barrels loaded at the same time, with clean barrels and a full charge. I bequeath to my trustees for the term of fifty years above mentioned, if any of the said horses, ponies, or hounds shall so long live, the cottage and garden now occupied by *W. Vatter*, and also the stables, kennels and buildings now occupied by my said horses, ponies and hounds, and the yards appurtenant thereto. I bequeath to The Royal Society for the Prevention of Cruelty to Animals in *London* the sum of £2000 free of legacy duty, and that the same and the legacy duty thereon respectively shall be paid exclusively out of such part of my personal estate as may be legally bequeathed for charitable purposes. In consideration of the maintenance of my horses, ponies and hounds being a charge upon my said estate as aforesaid, I give all my personal estate not otherwise disposed of unto the said *James Cooper*, his heirs, executors, administrators, and assigns absolutely."

The testator died on the 3rd of December, 1887. This was an originating summons by *James Cooper*, who had assumed the name of *Dean*, as Plaintiff, against the trustees of the will, asking a declaration that the gift of the £750 a year to the Defendants for the purposes mentioned in the will was invalid, or in the alternative, a declaration that the Plaintiff was entitled under the trusts of the will to the balance from time to time in any year, commencing from the testator's death, of the £750, after making provision for the maintenance of the testator's horses hounds, stables, kennels and buildings mentioned in his will.

Cozens-Hardy, Q.C., and *Vernon R. Smith*, for the Plaintiff:—

The gift of the annuity for the maintenance of the horses and dogs is not a charitable gift. If it were, it must fail, because the annuity is charged on land. But, not being a charity, the trust fails, because there is not any *cestui que trust* who is capable of enforcing it. "A trust must be for the benefit of some person or persons, and if this ingredient be wanting, as in a trust for keeping up family tombs, the trust is void:" *Lewin* on Trusts (1); *Rickard* v. *Robson* (2); *Lloyd* v. *Lloyd* (3).

(1) 8th ed. p. 106. (2) 31 Beav. 244. (3) 2 Sim. (N.S.) 255.

[NORTH, J.:—In *Mitford* v. *Reynolds* (1) a testator gave the remainder of his property, "after deducting the annual amount that will be requisite to defray the keep of my horses (which I will and direct be preserved as pensioners)," to the Government of *Bengal*, for a charitable purpose; and the report states that the order on further consideration made provision for the maintenance of the testator's horses.]

The point is not referred to in the report, either in the arguments or the judgment, and the case cannot be regarded as an authority in favour of the validity of such a trust.

[*Everitt*, Q.C., referred to *In re Douglas* (2).]

The only other case in which such a trust is referred to is *Attorney-General* v. *Whorwood* (3), where it was said in the course of the argument, "the Court has refused carrying into execution a particular turn of mind, though it was not a superstitious or illegal, but an indifferent use; as to feed sparrows, &c., especially as this is for ever."

The gift is void, as tending to a perpetuity; it depends on the lives, not of human beings, but of animals.

If the gift is not void, the Plaintiff is entitled to the unapplied surplus. There is no beneficial gift to the trustees, and the trust is too vague to be executed by the Court: *Morice* v. *Bishop of Durham* (4); *Gibbs* v. *Rumsey* (5); *Fowler* v. *Garlike* (6); *Buckle* v. *Bristow* (7); *Ellis* v. *Selby* (8); *Yeap Cheah Neo* v. *Ong Cheng Neo* (9); *Brown* v. *Burdett* (10); *Vezey* v. *Jamson* (11).

Everitt, Q.C., and *Alexander*, for the trustees of the will:—

The gift is not a charitable trust.

[NORTH, J.:—You need not argue that point.]

No trust is created. The gift is an absolute beneficial one to the trustees, coupled with a statement of the testator's motive for making it. The testator wished that his horses and dogs should

(1) 16 Sim. 105.
(2) 35 Ch. D. 472.
(3) 1 Ves. Sen. 534, 536.
(4) 10 Ves. 522, 535.
(5) 2 V. & B. 294.
(6) 1 Russ. & My. 232.
(7) 10 Jur. (N.S.) 1095.
(8) 1 My. & Cr. 286.
(9) Law Rep. 6 P. C. 381, 388.
(10) 21 Ch. D. 667.
(11) 1 S. & S. 69.

NORTH, J.
1889
In re DEAN.
COOPER-DEAN *v.* STEVENS.

be well taken care of after his death, and, in order to give the so-called trustees a motive for taking care of them, he bequeathed an annuity to them, determinable on the death of all the animals. The question of the validity of the provision for the horses in *Mitford* v. *Reynolds* (1) could not have been overlooked.

In *Morice* v. *Bishop of Durham* (2) there was a clear trust, and the same observation applies to *Vezey* v. *Jamson* (3); *Ellis* v. *Selby* (4); *Yeap Cheah Neo* v. *Ong Cheng Neo* (5); and *Fowler* v. *Garlike* (6). *Gibbs* v. *Rumsey* (7) has not been overruled. The trustees are not to be accountable in any way. This excludes the notion of any trust: *Stead* v. *Mellor* (8).

Cozens-Hardy, in reply.

NORTH, J.:—

The first question is as to the validity of the provision made by the testator in favour of his horses and dogs. It is said that it is not valid; because (for this is the principal ground upon which it is put) neither a horse nor a dog could enforce the trust; and there is no person who could enforce it. It is obviously not a charity, because it is intended for the benefit of the particular animals mentioned and not for the benefit of animals generally, and it is quite distinguishable from the gift made in a subsequent part of the will to the *Royal Society for the Prevention of Cruelty to Animals*, which may well be a charity. In my opinion this provision for the particular horses and hounds referred to in the will is not, in any sense, a charity, and, if it were, of course the whole gift would fail, because it is a gift of an annuity arising out of land alone. But, in my opinion, as it is not a charity, there is nothing in the fact that the annuity arises out of land to prevent its being a good gift.

Then it is said, that there is no *cestui que trust* who can enforce the trust, and that the Court will not recognise a trust unless it is capable of being enforced by some one. I do not assent to that view. There is not the least doubt that a man may if he

(1) 16 Sim. 105.
(2) 10 Ves. 522.
(3) 1 S. & S. 69.
(4) 1 My. & Cr. 286.
(5) Law Rep. 6 P. C. 381.
(6) 1 Russ. & My. 232.
(7) 2 V. & B. 294.
(8) 5 Ch. D. 225.

pleases, give a legacy to trustees, upon trust to apply it in erecting a monument to himself, either in a church or in a churchyard, or even in unconsecrated ground, and I am not aware that such a trust is in any way invalid, although it is difficult to say who would be the *cestui que trust* of the monument. In the same way I know of nothing to prevent a gift of a sum of money to trustees, upon trust to apply it for the repair of such a monument. In my opinion such a trust would be good, although the testator must be careful to limit the time for which it is to last, because, as it is not a charitable trust, unless it is to come to an end within the limits fixed by the rule against perpetuities, it would be illegal. But a trust to lay out a certain sum in building a monument, and the gift of another sum in trust to apply the same to keeping that monument in repair, say, for ten years, is, in my opinion, a perfectly good trust, although I do not see who could ask the Court to enforce it. If persons beneficially interested in the estate could do so, then the present Plaintiff can do so; but, if such persons could not enforce the trust, still it cannot be said that the trust must fail because there is no one who can actively enforce it.

Is there then anything illegal or obnoxious to the law in the nature of the provision, that is, in the fact that it is not for human beings, but for horses and dogs? It is clearly settled by authority that a charity may be established for the benefit of horses and dogs, and, therefore, the making of a provision for horses and dogs, which is not a charity, cannot of itself be obnoxious to the law, provided, of course, that it is not to last for too long a period. Then there is what I consider an express authority upon this point in *Mitford* v. *Reynolds* (1). The report shews which were the important clauses in the testator's will. The will was made in 1835, and the 8th clause of it provided for the purchase by his executors, and preparation for the deposit of his body, of a certain mount which he indicated, on which they were to erect a monument, and the expenses of doing this were to be provided "from the surplus property that will and may be found after the payment and discharge shall have been made of the above legacies and bequests, &c." Then he

(1) 16 Sim. 105.

NORTH, J.
1889
In re DEAN.
COOPER-DEAN *v.* STEVENS.

said, that, "though aware that the monument-mount may not be consecrated, I yet direct and expressly will and command that this injunction for the place of final interment be absolutely attended to and carried into instant effect and completion."

There was, therefore, a trust for the erection of a monument. It is true that that trust failed, but it failed only because the monument was to be erected upon the land of a person who, as it turned out, would not sell his land for the purpose. There is nothing in the report of the case which indicates that it would not have been a good trust, if the site fixed on by the testator had been available for the purpose. Then the 9th clause of the will was this, "I will, devise, give, and bequeath the remainder of my property, of whatsoever kind and description and that may arise from the sale of my effects, after deducting the annual amount that will be requisite to defray the keep of my horses (which I will and direct be preserved as pensioners, and are never, under any plea or pretence, to be used, rode or driven, or applied to labour) to the Government of *Bengal*, for the express purpose of that Government applying the amount to charitable, beneficial, and public works at and in the city of *Dacca* in *Bengal*." The testator died in 1836. The bill was filed by the testator's widow against his executors and next of kin, and the *East India Company*, and the Attorney-General. The case was heard first by Vice-Chancellor *Shadwell*, and, by the decree made on the 8th of June, 1838, it was declared that the bequest in the 9th clause was a good and valid bequest for the charitable purposes therein mentioned, and inquiries and accounts were directed. There was an appeal from that declaration, and Lord *Cottenham* refused to decide the question raised by the appeal until the inquiries directed by the decree should have been made, and the existence of a residue ascertained by taking the accounts. But he directed the Master to inquire what the testator meant by the "Government of *Bengal*." The Master made a separate report, and in consequence of what he found thereby, the Earl of *Auckland*, the then Governor-General of *India*, was made a Defendant to the suit. Afterwards, the Master made his general report, finding that all the next of kin of the testator were parties to the suit, and that there was a considerable residue, and the appeal came on to be

heard by Lord *Lyndhurst* (1). Counsel appeared for the Plaintiff, for the next of kin, and also for the *East India Company*, the Earl of *Auckland*, and the Attorney-General. The Lord Chancellor came to the conclusion that the gift to the Government of *Bengal* was a good charitable bequest. Then he directed further inquiries, and the matter came before him again for further directions, and he reserved the question of the validity of the bequest for the monument, and directed an inquiry what sum would be reasonably required for the purpose of carrying into effect the directions contained in the 8th clause of the will. The Master reported that the owner of the designated site for the monument would not sell it on any terms for the purposes mentioned in the will, and the cause came before the Vice-Chancellor in 1848 to be heard for further directions.

It appears from the report (2) that the *East India Company*, and Lord *Auckland*, and also the Attorney-General, were again represented by counsel, and it was contended that the direction in the 8th clause of the will was illegal and void, and, consequently, that the money which would have been required for that purpose passed under the 9th clause to the *Dacca* charity. The report states (3) that the following declaration was made: "Declare that, it appearing, by the Master's report, that the mount cannot be purchased, the bequest in the 8th clause totally fails, and that the clear residue of the testator's estate, after payment of his funeral expenses, debts, and legacies, and the costs of the suit, ought to be paid to the Governor-General of *India*, for the charitable purposes expressed in the 9th clause." And it is added: "The order then directed the costs of all parties to be taxed, and, made provision for the maintenance of the testator's horses; and on the death of them or either of them, the Governor-General was to be at liberty to apply to the Court as he might be advised." The order made on further consideration in that case has been produced from the Record Office during the hearing of the present case, and it contains a declaration that the provision for the horses was good. It is clear there must have been evidence before the Court shewing that at that time two only of

(1) 1 Ph. 185. (2) 16 Sim. 105.
(3) 16 Sim. 120.

NORTH, J.
1889
In re DEAN.
COOPER-DEAN *v.* STEVENS.

the testator's horses (he had died eleven years before) were living. Then provision was made for carrying over the sum of £1800 Consols to the fund for the maintenance of the horses, and directions were given for the application of the income, with liberty to apply, as to the whole or part of the fund, when the horses or either of them should have died.

It is impossible to suppose that, from the beginning to the end of these proceedings, the question whether the gift was good or bad was never brought to the attention of all the learned Judges before whom the case came. I do not indeed find that any formal discussion took place upon it. This may have been because all the parties agreed upon the point, or it may have been disposed of by the Judge in the course of the argument. But it is impossible to suppose that the matter was not fully present to the learned counsel who argued the case, or to the various Judges before whom it came, and that they did not treat the gift as valid. The point must have been raised, because the fund out of which it was to take effect (if it were good) was given to a charity. It was the duty of the counsel for the Governor-General and the *East Indian* Government to raise the point on behalf of the charity, if there was anything in it, because the charity would have taken so much more, if the provision for the horses were invalid. That being so, I think I may treat that case as a decision by very high authority that such a provision is good, and, if I had felt any doubt about the point myself, I should have considered that authority as settling it, so far as I am concerned. There is nothing, therefore, in my opinion, to make the provision for the testator's horses and dogs void.

Then the next question is this: the gift is of an annuity of £750, during the lives and life (to put it shortly) of the horses and dogs, and the survivors or survivor of them, and of course, a time would arrive when the provision which the testator thought right to make for all the animals would be much more than sufficient for the three or the two or the one which might survive. The annuity is to cease entirely when the last survivor dies, and it is obvious that nothing like that sum could or would be applied for the benefit of the animals when they became greatly reduced in number. The question is, whether the annuity was

given to the trustees beneficially. In my opinion it was not given to them beneficially. They are from beginning to end called "the trustees," and beyond all question the principal trust to be discharged by them under the will is that relating to the horses and dogs. There was, no doubt, the management trust, and that was a serious trust while it lasted, but it came to an end at the close of a year after the testator's death. These persons are described throughout as "trustees," and the annuity is given to them as trustees, and, in my opinion, they took it only as trustees, for the purpose of giving effect to the trust declared of it, and they did not themselves take any beneficial interest in it. The trust is for payment to the trustees. Then there is a declaration that the trustees shall apply the annual sum payable to them in the maintenance of the horses and dogs. They have a discretion as to the repair of the buildings, but they are not under any obligation to leave the buildings in a state of repair at the end of the term. Then come the words: "Any part thereof remaining unapplied shall be dealt with by them at their sole discretion." If the testator had meant them to take beneficially, it would have been very easy to say that "any surplus, after satisfying the aforesaid purposes, shall be divided among them for their own use." But the testator does nothing of that sort. He treats them as having a joint interest. The annuity is to be applied by them, it is to be subject to a discretion to be exercised by them, and, in my opinion, looking at the whole of the will, it was not intended to vest the annuity in them beneficially, but only to give them a discretion with respect to it as trustees. I have omitted to read these words which form part of the sentence: "I declare that my trustees shall not be bound to render any account of the application or expenditure of the said sum of £750, and any part thereof remaining unapplied shall be dealt with by them at their sole discretion." In my opinion the testator intended by these words to give them complete latitude as to the keeping up of the stables and kennels for the horses and dogs, and as to the provision to be made for them; in other words, he intended that it should not be open to any one to say that the trustees had spent more than was reasonable for the purpose, or that the animals could have been very well maintained for

NORTH, J.
1889
In re DEAN.
COOPER-DEAN v. STEVENS.

a much less sum than had been actually spent upon them, and that the trustees must account for the surplus on that footing. In my opinion he intended to give them an absolute discretion as to how much of the annuity was to be applied in that way. His object was to make them absolute masters of the application of the money for the benefit of the horses and dogs, without their being liable to account for having spent more than a reasonable sum upon that object.

Then the final words of the will throw great light upon the testator's intention. It must be remembered that the trust is to come to an end when the last surviving horse or dog has died. It is clear, therefore, that he was considering the benefit of the animals which are the object of the trust, and, *primâ facie*, it was not his intention to benefit the trustees, as distinguished from the animals which they were to maintain, and the final words, I think, shew this very clearly. It is clear that he was not leaving to the trustees a discretion as to the way in which they were to deal with the animals, but he was himself giving directions as to what was to be done about them, and lastly, if a time should arrive at which the trustees should think that any of them should be killed, he gives specific directions as to the mode by which that end is to be accomplished, thus shewing that he was giving directions which they were bound to follow, and not merely giving them an absolute discretion to apply the money to those purposes or to any other purposes they pleased. Then, coming to the final words of the will, why does he give his personal estate not otherwise disposed of to the tenant for life of the real estate? For this reason: "In consideration of the maintenance of my horses, ponies, and hounds being a charge upon my said estates as aforesaid." Not in consideration of there being this charge of £750 a year on the estates, but in consideration of the maintenance of the animals being a charge upon the estates. I have no doubt he was expressing his intention that the charge was to be for carrying out of that purpose, and that he did not intend to confer any benefit upon the trustees.

I think it is not necessary to comment upon the cases which have been cited on this point, for there is no conflict between them; the only question is within which class of them the

present case falls. In my opinion, upon this will, especially having regard to the last clause, it is clear that the testator is only making a provision for the maintenance of the animals, and that he does not intend to confer any benefit on the trustees.

I must, therefore, declare that the trustees do not take the surplus beneficially, but, upon the question whether the surplus belongs to the heir-at-law or to the devisee of the real estate, by reason of its not being raisable out of the estate, I say nothing in the absence of the heir-at-law.

Solicitors: *Lovell, Son, & Pitfield; Caprons & Co.*

W. L. C.

EDEVAIN *v.* COHEN.

NORTH, J.
1889
May 7, 8, 9, 13, 14

[1886 E. 511.]

Practice—Amendment at Trial—Rules of Supreme Court, 1883, *Order* XXVIII., *r.* 1.

An action was brought for the recovery of furniture wrongfully removed and damages. Judgment had been obtained by the Plaintiffs for the wrong now complained of against other persons in another action. There was some evidence of acts done since the writ in the former action which might raise a fresh cause of action. After the evidence for the Plaintiffs and one Defendant was closed, the Court refused to allow the Defendants to amend by pleading merger of cause of action in the judgment, because that would in justice require that the Plaintiffs should also be allowed to new assign and adduce fresh evidence.

THIS was an action for wrongful removal of furniture belonging to the Plaintiffs from a house which was at the time of the removal not occupied. The Plaintiffs claimed delivery of such parts of the furniture as had not been sold in market overt, damages, and costs.

Of the two Defendants to the action, the first, *Morris Cohen,* alleged by his statement of defence that he had nothing to do with the transactions complained of. The other Defendant, *Frederick Cook,* alleged that so far as he had acted in the matters complained of, he had acted merely as a servant and without notice of any claim of the Plaintiffs. It appeared in the course of the trial of the action that the Plaintiffs had obtained judgment against three other persons, Defendants to another action (*Edevain* v. *Watmore*), in respect of the matters alleged in the

NORTH, J.
1889
EDEVAIN
v.
COHEN.

statement of claim in this action. But there was some evidence of subsequent acts by the Defendants in respect of the subject matter of the action which might raise a fresh cause of action.

After the witnesses for the Plaintiffs and for the Defendant *Cohen* had been examined, counsel for the Defendants asked leave to amend their respective statements of defence by pleading merger of the cause of action in the judgment obtained in the action of *Edevain* v. *Watmore.*

The solicitors of the Defendant *Cohen* were the solicitors of all the Defendants in *Edevain* v. *Watmore.* They also acted for some time as solicitors for the Defendant *Cook* in this action. The Judge held as matter of fact that the Defendant *Cook* had actual knowledge of the proceedings in *Edevain* v. *Watmore.*

Everitt, Q.C., and *Harper*, for the Defendant *Cohen.*

Oswald, for the Defendant *Cook*:—

The rule of the Court is that, subject to payment of any additional costs caused by the omission to plead properly, any party will be allowed to amend his pleading at any stage, so as to put him in as good a position as he would have been if he had pleaded properly at first.

[NORTH, J., referred to *Collette* v. *Goode* (1).]

In some of the earlier cases a narrow view was taken of the construction of the rules; that case is no longer good law: *Tildesley* v. *Harper* (2); *Steward* v. *North Metropolitan Tramways Company* (3); *Riding* v. *Hawkins* (4).

Cozens-Hardy, Q.C., *A. Cock*, Q.C., and *Geo. Henderson*, for the Plaintiffs:—

The defence now sought to be set up is a technical defence, having no merits. It is in this respect in the nature of such a defence as a defence on the *Statute of Frauds* or a *Statute of Limitations.* The Court will not assist a man to defraud another by the exercise of its discretion in favour of an amendment. To allow such an amendment would be to do away with the rule that such a defence as the *Statute of Frauds* or a *Statute of Limitations* must be pleaded. A technical rule of judge-made law

(1) 7 Ch. D. 842.
(2) 10 Ch. D. 393.
(3) 16 Q. B. D. 556.
(4) 14 P. D. 56.

stands on no higher basis than a technical rule imposed by statute.

The Defendants have in no way been taken by surprise It is difficult to imagine that either of the Defendants, as they were concerned in the matter, did not know personally of the other action. The Defendant *Cook* clearly did; when they have chosen to defend on the merits at this late stage they ought not to be allowed to amend. If an amendment were allowed, in all justice the Plaintiffs also ought to be allowed to amend, and in effect new assign by pleading matter since the issue of the writ in the former action, on which a fresh cause of action has arisen. On that the Plaintiffs would be entitled to give further evidence Nor, after what has happened here, could they, even by allowing the action to stand over, be put in the same position as if the trial had not proceeded so far.

Everitt, in reply.

NORTH, J.:—

In this case I do not propose to allow the amendment in question. The facts are, very shortly, these: A tort is committed—I assume, for the purpose of dealing with this question, that a tort was committed—by several persons, of whom the Defendants are two. A tort was committed, an action was brought by the Plaintiffs against some of those persons, neither of the present Defendants being one of them, and judgment was recovered against those other Defendants. These Defendants afterwards put in their defences with knowledge of the existence of the other action; because it is clear that *Morris Cohen's* solicitor, at any rate, knew all about it, which was his knowledge of the matter; and I am not going to believe for a moment that *Frederick Cook* did not know all about it. Therefore I say these Defendants, with knowledge of the existence of the other action, and what had been done in it, put in their defences at a subsequent date without raising this defence. The defence is not suggested by the counsel for *Morris Cohen* until he has shortly stated his points, has gone into all his evidence, and has only not addressed me because I suggested that it would be convenient

NORTH, J.
1889
EDEVAIN
v.
COHEN.

that the other Defendant's evidence should be given before I heard the counsel for the first Defendant. Then the counsel for the second Defendant mentioned this point, and said he would ask for leave to amend; and then, for the first time, the counsel for *Morris Cohen* said he should like to be in the same position as regards amendment; and the question is, whether now, at this stage, the amendment should be allowed.

Now the case of *Collette* v. *Goode* (1) I think is a very doubtful precedent; there is this difference; in that case the defendant did not know of, what I hold that the Defendants in this case did know of, the existence of the matter as to which they wished to amend; and I confess that in *Collette* v. *Goode* I thought it was very hard upon my client that leave to amend was refused; and very possibly if that case had not been settled before it was concluded, the opinion of the Court of Appeal might have been taken upon it. But in refusing leave I am not acting upon that case. I think that the course of decisions since has been such that if a case exactly similar to that came before the Court again, the learned Judge who decided the case would now decide differently, and I should not have adopted the same line at the present day in a case exactly in point. But I think the tendency of the later cases, some of which have been referred to, is to show that amendments must be made for the purpose of doing justice. For instance, to adopt the language of Mr. Justice *Bowen* in the earlier case cited in *Steward* v. *North Metropolitan Tramways Company* (2), on page 558 Lord *Esher* says: "The same principle was expressed I think perhaps somewhat more clearly by Lord Justice *Bowen*, who says that an amendment is to be allowed 'whenever you can put the parties in the same position for the purposes of justice that they were in at the time the slip was made.'" Under those circumstances I should have thought in the present case that it would not be right to preclude the Defendants now from setting up the judgment recovered in another action by virtue of which the present Defendants were all released from damages which otherwise they would have been liable to pay; but it is clear from the authority that has been referred to that I ought not to allow the

(1) 7 Ch. D. 842. (2) 16 Q. B. D. 556.

amendment now if the other side would be prejudiced by it, and prejudiced by it I mean in other ways than in matters of costs, which I could deal with now. If, for instance, I thought that allowing this amendment would merely cause certain costs to be thrown away, I should feel bound to allow the amendment, taking care that the Plaintiffs were not prejudiced, but were in as good a position as regards costs as if the amendment had not been allowed; but my reason for not allowing it is this: that it is quite clear that if I allowed it to be made now I should have to allow the Plaintiffs to amend their pleadings, and to new assign. It is quite clear to me that to some extent they could new assign effectively; therefore I cannot simply allow it now without either putting the Plaintiffs in a position in which I ought not to allow them to be put by such amendment being made at the last moment, or I should have to direct the matter to stand over in order that they may amend their pleadings and go into further evidence, which would have to be taken before the Court for the purpose of getting definite information on definite points to which, although all the evidence has been taken with the knowledge that this amendment would be asked for, the attention of the parties and the counsel on the other side has not been drawn, and without going into which evidence it would be impossible to do justice to the Plaintiffs; because at any rate, if the defence were held and allowed to be good, I could not without that fresh evidence give them the benefit of the new assignment, upon which I see clearly they must, to some extent, succeed.

Under these circumstances I could not in fairness to the parties allow the amendment proposed at the present time; and although I could have granted it, if I thought it should be allowed, even at the last moment, putting the parties right as to costs, I find that I cannot, by any order I might make as to costs, put the Plaintiffs in their right position; and therefore I refuse the Defendants leave to amend.

Solicitors for the Plaintiffs: *Morris & Rickards.*
Solicitors for the Defendant *Cohen: Nordon & Lazarus.*
Solicitor for the Defendant *Cook: F Bradley.*

D. P.

STIRLING, J.
1889
May 7.

In re DE BURGH LAWSON.
DE BURGH LAWSON *v.* DE BURGH LAWSON.

[1882 D. 2247.]

Power—Direction by Married Woman to her Executors to pay Debts—Appointment to the Persons named as Executors upon Trusts—Debts so called charged on appointed Property.

A married woman who died in 1880 entitled for her life, for her separate use, without power of anticipation, to the income of certain estate, with a general testamentary power of appointing the same estate, by her will directed her executrixes thereinafter named to pay her just debts, and by virtue of the power appointed, devised, and gave the same estate unto two daughters, whom she appointed executrixes, upon certain trusts for the benefit of her children equally for life, and after the death of the survivor for the benefit of her grandchildren equally. In an administration action the Chief Clerk certified that the testatrix was indebted at the time of her death to several persons:—

Held, that the debts, so called, were a charge upon the appointed property.

In re Tanqueray-Willaume and Landau (1) applied to the case of a married woman's will.

DAME *MARY* (who died on the 30th of June, 1880), the wife of Sir *Henry De Burgh Lawson*, who was entitled to a share in the *Bedlington Coal Company's* property for her life for her separate use, without power of anticipation, by her will made on the 3rd of October, 1879, after directing her executrixes thereinafter named to pay all her just debts, funeral and testamentary expenses, gave all money standing to her credit with any bankers unto and equally between such of her children as should be living at the time of her death, and then, by virtue of a power reserved to her in and by the last will and testament of her late mother *Mary Stoddart*, she appointed, gave, devised and bequeathed the moiety of and in one-sixteenth share and interest in the *Bedlington Coal Company*, and of and in the collieries, land, and hereditaments, with the stock and plant connected with the collieries and belonging to the company, unto her daughters *Clara Alexandrina Wormald* and *Ada Mary Wormald De Burgh Lawson*, their heirs,

(1) 20 Ch. D. 465.

executors, administrators and assigns upon trust, that they or other the trustees for the time being of her will, or the survivor of them, or the executors, administrators, or assigns of such survivor, should divide and pay the interest, dividends, and annual proceeds arising from the said collieries and properties, and payable in respect of her said share and interest therein, as, and when the same should be received by them, unto and equally between all her children living at the time of her death during their respective lives, and after the death of the last survivor of her children then upon trust that the trustees should call in and dispose of her said share and interest in the said collieries either by public auction or private contract, and divide the money to arise from such sale after payment thereout of all expenses connected with such sale equally between such of her grandchildren as should be living at the death of the last survivor of her children.

The testatrix appointed her two daughters above named executrixes of her will.

An action was brought by a son of the testatrix against the executrixes for the administration of her estate, and in taking the accounts the Chief Clerk certified that the Defendants had since the death of the testatrix received dividends from the *Bedlington Coal Company* in respect of her share or interest to the amount of £2675, and had paid and been allowed the sum of £1599 for funeral and testamentary expenses, debts, and mourning. He also certified that the debts of the testatrix amounted altogether to the sum of £1028 10*s.*; that the executrixes had paid a portion of them amounting in the aggregate to the sum of £942 6*s.* 6*d.*, and that there were debts remaining unpaid to the amount of £86 3*s.* 6*d.* Also that the only separate estate which the testatrix had at the time of contracting the said debts consisted of her life interest in the moiety of one-sixteenth share in the coal company (leasehold) to which she was entitled for her sole and separate use without power of anticipation, with an absolute power of appointment by will which she exercised; and he reserved for the opinion of the Court the question whether the separate estate or any part of it of the testatrix was capable of being reached by the judgment and execution of the Court for

STIRLING, J.

1889

In re DE BURGH LAWSON.

DE BURGH LAWSON *v.* DE BURGH LAWSON.

the purpose of being applied in payment of the said debts. The testatrix had not at the time of her death any money standing to her credit with any bankers. No exception had been taken to the Chief Clerk's certificate.

Warrington, for the Plaintiff:—

The will in this case was made in 1879, and the testatrix, a married woman, with a testamentary power of appointment, over separate estate, which she exercised, died in 1880, long before the *Married Women's Property Act*, 1882, came into operation, and therefore the appointment made by the testatrix in 1879 did not make the appointed property liable for the payment of her debts: *In re Roper* (1).

Farwell, for the executrixes:—

I rely upon the decision in *In re Tanqueray-Willaume and Landau* (2). Here, as in that case, there is a charge of debts and then a devise and bequest of this particular share and interest in the colliery property, the only possible fund or property which was subject to the testatrix's power of appointment. She had a small property other than the share in the colliery which she had no power to dispose of by will. There is nothing in the case of *In re Roper* to interfere with the rule of law laid down in *In re Tanqueray-Willaume and Landau*, that where the executors take the whole legal fee as joint tenants the direction to them to pay debts, charges the real estate with debts, though they take unequal beneficial interests in it. In this case the Court is relieved from any question of inequality. The testatrix directed her debts to be paid by her executrixes, and then appointed to them property over which she had a power of appointment, and I submit that the debts are payable out of the property coming to the executrixes' hands: *Hartland* v. *Murrell* (3).

[STIRLING, J., referred to the case of *In re Bailey* (4).]

Harris v. *Watkins* (5) is also in point, as the debts are, according to the intention of the testatrix, to be paid by the executrixes,

(1) 39 Ch. D. 482.
(2) 20 Ch. D. 465.
(3) 27 Beav. 204.
(4) 12 Ch. D. 268.
(5) Kay, 438.

and there are no unequal gifts made to them. There is no conflict of authority arising in this case. I may refer to the case of *In re Harvey's Estate* (1), where property settled for life on a married woman for her separate use with a power of appointment was made liable for the payment of her debts.

Boome, for the grandchildren:—

I rely upon the decision in *In re Roper* (2), and submit that it governs this case. The case of *In re Tanqueray-Willaume and Landau* (3) is distinguishable. That was the case of a man having power to charge his estate with the payment of debts, whereas this is the case of a woman who purported to charge her estate by a will made before the *Married Women's Property Act*, 1882. *In re Harvey's Estate* is altogether distinguishable from *In re Tanqueray-Willaume and Landau*, as in that case there was no charge of debts.

[STIRLING, J., referred to *Hodges* v. *Hodges* (4).]

There the decision in *In re Harvey's Estate* appears to have been followed, but that was a case of an application by a married woman to remove the restraint on anticipation.

STIRLING, J.:—

In my opinion this case falls within the decision in *In re Tanqueray-Willaume and Landau*. The testatrix directed her executrixes thereinafter named to pay all her just debts, and after giving all money standing to her credit with any bankers —but it appears that she had none at any bank—unto her children, she appointed and gave her share and interest in the *Bedlington Colliery* property to two of her daughters upon certain trusts, and afterwards appointed the same two daughters the executrixes of her will. There was no other gift made by the testatrix. There was, therefore, at the commencement of the will a direction to the executrixes thereinafter named to pay all just debts, and the rule laid down in the case of *In re Tanqueray-Willaume and Landau*, where there was a direction by a testator to his executrix and executor thereinafter named to pay all his

(1) 13 Ch. D. 216.
(2) 39 Ch. D. 482.
(3) 20 Ch. D. 465.
(4) Ibid. 749

STIRLING, J.

1889

In re DE BURGH LAWSON.

DE BURGH LAWSON *v.* DE BURGH LAWSON.

just debts, and that was followed by a devise to them of all his real estates upon certain trusts, was that as the executors in such case took the whole legal fee as joint tenants, the direction to them to pay debts charged the real estate with debts. It was also laid down that that does not apply if other parts of the will give indications of a contrary intention, as was the case, for example, in *In re Bailey* (1). But in this case there is nothing of that nature, and therefore it seems to me that the doctrine laid down in *In re Tanqueray-Willaume and Landau* (2) should be applied. Now were there any debts to be paid? This is the will of a married woman, and it is said that, strictly speaking, she could have no debts to pay; but the certificate of the Chief Clerk concludes the matter by finding that there were debts of the testatrix within the meaning of the directions given in the will to pay all her just debts, funeral, and testamentary expenses, and therefore I hold that the so called debts which the executrixes have paid, and those remaining due ought to be paid out of the testatrix's share and interest in the *Bedlington Coal Company.* There will be a declaration that the debts are a charge upon the *corpus* of the appointed property, and leave will be given to apply in Chambers to raise by mortgage the sum necessary to pay them, and the costs of all parties as between solicitor and client.

Solicitors: *Crossman & Prichard; John Scaife,* agent for *H. T. Duncan, South Shields; G. & W. Webb.*

(1) 12 Ch. D. 268. (2) 20 Ch. D. 465.

T. F. M.

TOMLIN *v.* LUCE.

KEKEWICH, J.

[1887 T. 1382.]

1889 April 4.

Mortgagee—Sale—Incorrect Particulars—Compensation—Liability—Mistake by Agent.

The particulars on a sale by mortgagees stated that the roads on the property were kerbed; this was not accurate, and the vendors declined to complete without compensation. The sale was completed, compensation being allowed:—

Held, that as against a second mortgagee the first mortgagees were liable for the mistake, and in taking the account must be charged with the sum allowed as compensation.

By an indenture of mortgage dated the 26th of October, 1883, *W. H. Gibbs* conveyed to *C. R. Luce*, *W. H. Luce*, and *H. H. Meade King*, certain hereditaments at *West Kensington* as a security for £34,665 and interest. The indenture did not contain any special power of sale or any modification of the statutory powers as to mortgages.

W. H. Gibbs subsequently mortgaged the same hereditaments to *J. L. Tomlin* for £20,000, on which £4000 and interest, as he alleged, but as was disputed, still remained due.

On the 25th of February, 1886, the first mortgagees, in execution of their powers, caused the hereditaments to be put up for sale by auction in four lots, the particulars stating that "all the roads on the property are constructed in the best possible manner, are kerbed and sewered, and there is perfect main drainage."

Lots 2, 3, and 4, were sold for £20,800, and the purchaser alleged, as appeared to be the fact, that this statement was incorrect and declined to complete unless compensation was given. The vendors were advised, and, as the Court held, well advised, to complete, allowing compensation, which amounted to £895; on which terms the sale was carried into effect.

J. L. Tomlin, the second mortgagee, brought this action against the first mortgagees claiming an account of all moneys received by the Defendants, or which but for their wilful neglect or default they might have received, on the sale; the principal

KEKEWICH, J.
1889
TOMLIN v. LUCE

dispute being as to the £895 compensation. The first mortgagees denied their liability and alleged that the statement was inserted by the auctioneers.

This was the trial of the action.

Neville, Q.C., and *C. Browne*, for the Plaintiffs:—

A mortgagee must do his best in selling: *Marriot* v. *Anchor Reversionary Company* (1); as he is a trustee of the surplus. This deduction ought not to have been allowed. At all events the second mortgagee has a right to an inquiry: *In re Chifferiel* (2).

Warmington, Q.C., and *Lea*, for the first mortgagees:—

A mortgagee selling is not liable for a simple mistake, and is no more liable than any one else for making a mistake, and the presumption is in his favour. A trustee is not liable for a mere mistake: *In re Terry & White's Contract* (3); and a mortgagee is not even a trustee except of the surplus. They employed competent auctioneers and the mistake was theirs. In completing the sale the mortgagees took the wisest course.

Witnesses were examined as to how the mistake occurred, and to prove that the best course was to complete and allow compensation, and not to have a second sale.

Neville, in reply:—

There has been a mistake by which the second mortgagee has been injured, and the vendors who made the mistake are liable. Perhaps it is true that on a second sale the property would not have produced so much, but that is the fault of those who had made a second sale necessary. The vendors are liable for the mistakes of the agents whom they choose to employ, and this was a gross mistake.

KEKEWICH, J.:—

As to the first question, I have no doubt that there was an error in the particulars which enabled the purchaser to decline to complete. I have also no doubt on the evidence that the

(1) 2 Giff. 457; 3 D. F. & J. 177. (2) 40 Ch. D. 45.
(3) 32 Ch. D. 14.

vendors were well advised to give up the £895, and to complete so that the second mortgagee has nothing to complain of on that ground.

The question, however, remains whether the first mortgagees are or are not liable for this deduction from the price. The relations of mortgagor and mortgagee are not easily defined. A mortgagee is not in any proper technical sense a trustee of his power of sale or of any like powers for the mortgagor, and to say that he occupies a fiduciary position towards the mortgagor is, if true, wanting in precision. A power of sale is given to a mortgagee in order to enable him to realise his security, and he necessarily exercises it to that end. But he is not the owner of the estate, and therefore cannot sell as an absolute owner might, regardless of all other persons than himself. He owes a duty to the person entitled to the equity of redemption, or, as expressed by Lord Justice *Lindley* in a pregnant passage of the judgment of the Court of Appeal in the recent case of *Farrar* v. *Farrars, Limited* (1), he is under obligations to him. What restriction does this duty place on his actions? What is the limit of this obligation? Granted that all conditions calling the power of sale into operation have been fulfilled, a mortgagee is entitled to select his own time and mode of sale, and the Court will not interfere with his discretion except under circumstances which prove oppression or otherwise impeach the honesty of the transaction. He is entitled to employ agents. He may instruct a solicitor, and through him, if practising in the country, a *London* agent. He may, through that solicitor, or directly, instruct surveyors, auctioneers, and others whose services are reasonably required for the proper conduct of the sale. He may, through the solicitor, instruct counsel to settle the conditions of sale. But whatever is done by him through an agent must be taken to be done by himself, and, as between him and the mortgagors, he must be responsible for any acts and defaults. So long, however, as he selects agents presumably competent he cannot be made liable for their errors in judgment or in matters of detail not seriously affecting the success of the sale or the price realized. On the other hand, I think that if the mortgagee is guilty,

(1) 40 Ch. D. 395, 410.

KEKEWICH, J
1889
TOMLIN v LUCE.

directly or indirectly, of a serious blunder inducing a failure to sell, or a large diminution of the price realized, the mortgagor can hold him responsible for that, and it is no answer for him to say that the blunder was no fault of his own, but was that of an agent in whom he properly placed implicit confidence. The mortgagee must in such a case be left to his remedy against his agent.

This being what I understand to be the law applicable to such a case as this, it remains to apply it, and in doing so I must be careful not to cast blame on any person in particular. I decide the case only as between mortgagor and mortgagee, leaving any subordinate responsibility out of the question. The mortgaged property, being building land, was put up for sale by auction in lots, and in the particulars there is this statement: "All the roads on the property are constructed in the best possible manner, are kerbed and sewered, and there is perfect main drainage." It turns out that to some extent this was an erroneous statement, and that the roads were not completely kerbed. Obviously the error was one of some importance, and, having regard to the extent of the property and the price paid, the error was in fact equivalent to a considerable sum.

I have already held that the mortgagees compromised the purchaser's claim prudently, and that no blame can attach to them, or those acting on their behalf, for having allowed the sum of £895 as a deduction from the purchase-money in respect of this misstatement, and, that being so, it follows that as against the mortgagee the value of the misstatement must be taken to be this £895. It was a statement of a matter of fact, and the real fact could have been without difficulty, and ought to have been, ascertained.

This is no question of error in judgment, nor can it be said that this is a small matter as regards which the mortgagor is not entitled to expect anxious accuracy, but must be content if the care of a reasonable, prudent man is observed. It is often difficult to draw the line separating defaults of that class from those of a more serious character; but the present case seems to me to fall distinctly within the latter category, and the mortgagees must be held responsible for the error, to him who is standing in

the shoes of the mortgagor, and is most directly affected by it—that is, the Plaintiff as second mortgagee. Therefore, in taking the accounts between the first and second mortgagees, the first mortgagees must be charged with this £895 as part of the purchase-money which they have, or rather ought to have, received.

Solicitor for Plaintiff: *J. Thairlwall.*
Solicitors for Defendants: *Lane, Monro, & Soutter.*

C. M.

END OF VOL. XLI.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1889, will be as follows:—

In the First Series,
40 Ch. D.

In the Second Series,
22 Q. B. D. 14 P. D.

In the Third Series,
14 App. Cas.

INDEX.

ACCOUNTS—Mortgage—First and second mortgagees - - - - 573
See MORTGAGE. 4.
—— Mortgagor and mortgagee - - 537
See MORTGAGE. 2.

AGENT—Contract by—Ratification - 295
See PRINCIPAL AND AGENT.
—— Dismissal of—Arbitration - - 242
See ARBITRATION.
—— Parliamentary—Costs - - - 215
See COMPANY. 5.

ALIEN — *Infant — Guardian — Jurisdiction — French Subject — Certificate of Naturalization — Qualification—Naturalization Act*, 1870 (33 & 34 *Vict. c.* 14), *s.* 7.] The usual qualified certificate of naturalization under the Naturalization Act, 1870, effects only a partial, not a complete, naturalization; so that a Frenchman, in taking out such a certificate, does not thereby lose his status as a French subject, since by the French law he cannot be completely naturalized in a foreign country except by the authority of the French Government.—In 1866 a Frenchman came to reside in England, and in 1871 obtained the usual qualified certificate of naturalization as a British subject under the Naturalization Act, 1870, sect. 7, but he did not obtain from the French Government the necessary authority required by the law of France to his becoming a naturalized British subject. In 1880 he married an English lady and then returned with her to France, where he resided till his death. By his will, in French form, he gave his residuary estate, which included considerable personal estate in England, to his widow for life, with remainder to his two infant children, both of whom were born in France. On the death of the widow, who had continued to reside in France, a guardian of the infants was appointed by the French Courts:—*Held*, by Kay, J., that the father was at the time of his death, a French subject, and that his children were also French subjects, and, therefore, that the Court had no jurisdiction to appoint an English guardian of the infants.—*Held*, by the Court of Appeal, that, independently of the questions whether the naturalization of the infants' father was complete or not, and what was the effect of the naturalization, if complete, on the status of the children, on which the Court expressed no opinion, the Court ought not to interfere with the decision of the French Courts by appointing an English guardian. *In re* BOURGOISE - - C. A. 310

AMENDMENT—Pleadings—Adding plaintiff 341
See PRACTICE. 1.
—— Pleadings—At trial - - - 563
See PRACTICE. 2.
—— Pleadings—Case not raised on pleadings
See LANDLORD AND TENANT. 1. [248
—— Pleadings—Relief against third parties after judgment - - - - 28
See PRACTICE. 10.

ANIMALS—Trust for benefit of - - 552
See WILL. 4.

APPEAL — Amendment after — Relief against third parties - - - 28
See PRACTICE. 10.
—— Fresh evidence - - - - 98
See PRACTICE. 3.

APPOINTMENT - - - 417, 568
See POWER. 1, 2.

APPROPRIATION OF PAYMENTS — Banking account - - - - 456
See BANKER.

ARBITRATION—*Arbitration Clause — Dismissal of Agent — Action to restrain Dismissal—Motion to stay Proceedings—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 11.] The Defendant agreed to employ the Plaintiff as his agent for carrying on his business in a specified district for fifteen years: and the agreement contained a clause for referring to arbitration any disputes as to the construction of the agreement, or any payment, act, or thing relating to or arising out of the agreement. Before the term expired the Defendant dismissed the Plaintiff from his employment for alleged misconduct, and gave notice to refer the matters in dispute between them to arbitration, but among the matters in dispute he did not specify his dismissal of the agent. Both parties appointed arbitrators, but before anything more was done the Plaintiff brought an action against the Defendant to restrain him from dismissing him and from appointing another agent.

ARBITRATION—*continued.*
The Defendant moved to stay proceedings in the action on the ground of the agreement to refer all matters to arbitration.—*Held*, that the Defendant having taken upon himself to dismiss the Plaintiff without waiting the decision of the matters in difference by arbitration, the Court ought not to exercise their power of staying proceedings in the action:—*Held*, also, that it was too late after the commencement of the action for the Defendant to withdraw his dismissal of the Plaintiff in order that it might be included in the arbitration. DAVIS *v.* STARR - - C. A. 242
—— Public Health Act—Umpire — Time for making award - - - 52
See LOCAL GOVERNMENT ACTS.

BANKER—*Agent — Banking Account — Appropriation of Payments—Rule in Clayton's Case.*] A judgment creditor of a stockbroker obtained a garnishee order on a balance at a bank standing to the credit of the broker. All moneys in the bank to the broker's credit were moneys received for clients. Since money of a client had been paid in, drawings out in excess of the then balance had been made. And so in the case of another client. Except those two there was no client who claimed any part of the fund:—*Held*, by North, J., that, since according to *In re Hallett's Estate* (13 Ch. D. 696) the rule in *Clayton's Case* (1 Mer. 572) applies as between cestuis que trust, the clients had not made out that any part of the balance belonged to them, and that it must be paid to the judgment creditor:—*Held*, on appeal, that as no part of the moneys in the bank was the debtor's own, the judgment creditor had no right against the balance; that although the rule in *Clayton's Case* was applicable as between cestuis que trust it could not be applied unless there was a conflict between them in consequence of there not being enough to pay them all, and that here, it being clearly shewn that the balance in hand was equal in amount to the sums remaining due from the broker to these two clients in respect of moneys of theirs paid into the account, and that there was no claim on behalf of any other client, the money belonged to these two clients. HANCOCK *v.* SMITH - - - - C. A. 456

BILL OF COSTS - 323, 326, 381, 494
See SOLICITOR. 1—4.

BREACH OF TRUST—Insufficient securities 476
See TRUSTEE.

BRIDGE TOLLS—Interest in land—Mortmain
See CHARITY. [168

BROKER—Account at bankers—Money of clients
See BANKER. [456

BUILDING AGREEMENT—Power of re-entry—Rent in arrear - - - 248
See LANDLORD AND TENANT. 1.

CASES—*Allen* v. *Jarvis* (Law Rep. 4 Ch. 616) followed - - - - 326
See SOLICITOR 2.
—— *Anderson* v. *May* (2 B. & P. 237) observed upon - - - - - 326
See SOLICITOR. 2.

CASES—*continued.*
—— *Askew* v. *Askew* (57 L. J. (Ch.) 629) not followed - - - - 409
See WILL. 2.
—— *Bent* v. *Young* (9 Sim. 180) followed 151
See PRACTICE. 6.
—— *Besley* v *Besley* (9 Ch. D. 103) approved
See LANDLORD AND TENANT. 3. [103
—— *Broad* v. *Selfe* (11 W. R. 1036) discussed
See MORTGAGE. 1. [126
—— *Carrington (Lord)* v. *Payne* (5 Ves. 404) followed - - - - 64
See WILL. 1.
—— *Challoner* v. *Murhall* (2 Ves. 524) followed
See COPYHOLD. [547
—— *Christmas, In re* (33 Ch. D. 332), considered
See CHARITY. [168
—— *Clayton's Case* (1 Mer. 572) followed 456
See BANKER.
—— *Cooke* v. *Forbes* (Law Rep. 5 Eq. 166) considered - - - - 88
See LANDLORD AND TENANT. 2.
—— *Crossley* v. *Maycock* (Law Rep. 18 Eq. 180) approved - - - - 295
See PRINCIPAL AND AGENT.
—— *Crowe* v. *Del Rio* (9 Sim. 185, n.) observed upon - - - - - 151
See PRACTICE. 6.
—— *Davidson* v. *Kimpton* (18 Ch. D. 213) followed - - - - 409
See WILL. 2.
—— *Dunn* v. *Green* (3 P. Wms. 9) followed 547
See COPYHOLD.
—— *Edwards* v. *Hope* (14 Q. B. D. 922) followed
See PRACTICE. 4. [518
—— *Emanuel and Simmonds, In re* (33 Ch. D. 40) distinguished - - - 381
See SOLICITOR. 3.
—— *Field, In re* (29 Ch. D. 608) distinguished
See SOLICITOR. 3 [381
—— *Gardner* v. *London, Chatham, and Dover Railway Company* (Law Rep. 2 Ch. 201) followed - - - - 399
See COMPANY. 1.
—— *Hallett's Estate, In re* (13 Ch. D. 696), followed - - - - 456
See BANKER.
—— *James* v. *Kerr* (4 Ch. D. 449) discussed 126
See MORTGAGE. 1.
—— *Kent's Case* (39 Ch. D. 259) distinguished
See COMPANY. 6. [159
—— *Knapp* v. *Williams* (4 Ves. 430, n.) considered - - - - 168
See CHARITY.
—— *Lippard* v. *Ricketts* (Law Rep. 14 Eq. 291) considered - - - - 537
See MORTGAGE. 2.
—— *Love, In re* (40 Ch. D. 637) followed 494
See SOLICITOR. 4.
—— *Maden* v. *Taylor* (45 L. J. (Ch.) 569) followed - - - - 409
See WILL. 2.
—— *Marriott* v. *Tarpley* (9 Sim. 279) explained
See CHURCH. [507

CASES—*continued.*

—— *Marsh, In re* (38 Ch. D. 630) distinguished *See* POWER. 1. [417

—— *Marshall* v. *Marshall* (38 Ch. D. 330) distinguished - - - - 542 *See* PRACTICE. 9.

—— *Martineau* v. *Briggs* (23 W. R. 889) distinguished - - - - 64 *See* WILL. 1.

—— *Mitford* v. *Reynolds* (16 Sim. 105) explained *See* WILL. 4. [552

—— *Mortimer, In re* (54 L. J. (Ch.) 414), not followed - - - - 409 *See* WILL. 2.

—— *Palmer* v. *Johnson* (13 Q. B. D. 351) distinguished - - - - 103 *See* LANDLORD AND TENANT. 3.

—— *Potter* v. *Edwards* (26 L. J. (Ch.) 468) followed - - - - 126 *See* MORTGAGE. 1.

—— *Pulbrook* v. *Richmond Consolidated Mining Company* (9 Ch. D. 610) considered 462 *See* COMPANY. 4.

—— *Tanqueray-Willaume and Landau, In re* (20 Ch. D. 465), followed - - 568 *See* POWER. 2.

—— *Vanderhaege, In re* (20 Q. B. D. 146) discussed - - - - 118 *See* PRACTICE. 8.

—— *Walcott* v. *Lyons* (29 Ch. D. 584) distinguished - - - - 341 *See* PRACTICE. 1.

—— *Woodhouse* v. *Walker* (5 Q. B. D. 404) discussed - - - - 532 *See* WASTE.

—— *Wotherspoon* v. *Currie* (Law Rep. 5 H. L. 508) followed - - - 35 *See* TRADE MARK. 1.

—— *Yellowly* v. *Gower* (11 Ex. 274) discussed *See* WASTE. [532

CHARGE OF DEBTS—Married woman—Testamentary appointment - - 568 *See* POWER. 2.

CHARITY—*Mortmain—Interest in Land—Bonds of Harbour Trustees—Assignment of "Rates, Tolls, Rents, &c."—Bridge Tolls—9 Geo. 2, c. 36.*] Trustees were incorporated by a special Act for the purpose of managing a harbour. The Act empowered the trustees to demand certain rates in respect of vessels entering or leaving the harbour, and in respect of goods landed into or discharged from vessels entering the harbour; to levy tolls for the passage over certain bridges; and to lease any of the rates and tolls by the Act authorized at a rent. The trustees were also empowered to borrow for the purposes of the Act moneys, not exceeding a specified sum, "on mortgage of the several tolls, rates, and dues by this Act authorized." The Act provided that the mortgagees might enforce the payment of arrears of interest due to them by the appointment of a receiver.—The trustees borrowed money on the security of bonds for £100 each, by which they assigned to the lender of the money "such proportion of the several rates, tolls, rents, and other moneys arising by virtue of the Act as the said

CHARITY—*continued.*

sum of £100 doth or shall bear to the whole sum which is or shall be borrowed upon the credit of the said rates, tolls, rents, and other moneys," to hold to the assignee until the sum of £100, with interest thereon, should be paid:—*Held*, that the bonds amounted to an assignment of the bridge tolls specifically; that those tolls constituted an interest in land; and that, consequently, the bonds were within the Act 9 Geo. 2, c. 36, and could not be given to a charity.—*Knapp* v. *Williams* (4 Ves. 430, n.) cannot be considered as overruled by *In re Christmas* (33 Ch. D. 332). *In re* DAVID. BUCKLEY *v.* ROYAL NATIONAL LIFE BOAT INSTITUTION - - - - 168

—— Trust for benefit of animals - - 552 *See* WILL. 4.

CHURCH—*Churchyard, Freehold in—Lay Rector — Churchway — Public Way — Incumbent and Churchwardens — Right of Action—Injunction—Jurisdiction—Ecclesiastical Court—High Court of Justice—"Parishioner" — Ratepayer—Trespass.*] The Ecclesiastical Court having full jurisdiction to entertain an action and grant relief in respect of the interference with a churchway—such as a pathway within a parish churchyard—forming an approach for the parishioners to their parish church, the High Court will not exercise jurisdiction in respect of such an interference at the suit of a parishioner.—The lay rector of a parish, in respect of his freehold property in the parish church and churchyard, can maintain an action in the High Court against a trespasser.—A person not resident in a parish but owning property within it in respect of which he pays parish rates is a "parishioner" and entitled to sue as such.—The incumbent and churchwardens of a parish church removed—but without having obtained a faculty, or the consent of the justices under 59 Geo. 3, c. 134, s. 39—certain ancient steps leading down from the churchyard to the adjoining high road. These steps had been included in the churchyard, being recessed within the churchyard wall, and they had formed one of the approaches to a path in the churchyard leading to the church door. An action was thereupon brought by four parishioners against the incumbent and churchwardens for a mandatory injunction to compel the restoration of the steps. One of these Plaintiffs was also the lay rector of the parish, but in fact sued only as a parishioner:—*Held*, that the Court would not exercise jurisdiction by granting a mandatory injunction, on the grounds: (1) that the steps constituted a churchway, the right to use which was solely in the parishioners, and not a footway common to the public, and the Court would not exercise jurisdiction in respect of the interference with a churchway within the churchyard at the suit of a parishioner, a jurisdiction which was vested in the Ecclesiastical Court; and (2) that, even if a mandatory injunction were granted, it might be rendered nugatory by a faculty confirming the acts of the incumbent and churchwardens.—*Morriott* v. *Tarpley* (9 Sim. 279) explained. BATTEN *v.* GEDYE - - - - 507

CHURCHYARD—Way through - - 507 *See* CHURCH.

CO-DEFENDANTS—Appointment of guardian ad litem - - - - 415
See PRACTICE. 5.

CODICIL—Heirlooms bequeathed by will - 64
See WILL. 1.

COMMISSION—Mortgagee—Unfair pressure 126
See MORTGAGE. 1.

COMPANY—*Debenture—Waterworks—Undertaking, whether public or private—Rights of unpaid Debenture-holders as to Sale of Undertaking or Appointment of Manager—Power of Sale under Conveyancing and Law of Property Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 19.] Sect. 19 of the Conveyancing and Law of Property Act, 1881, conferring on a mortgagee, where the mortgage is by deed, a power of sale, does not apply to the debentures of a joint stock company.—By a Provisional Order under the Gas and Water Works Facilities Act, 1870, authorizing a waterworks undertaking, two individuals, "and the survivor of them and the executors or administrators of such survivor, their or his assigns" were declared to be the "undertakers" for the purposes of the Order, and power was conferred on the undertakers to acquire lands by agreement (but not compulsorily), to construct waterworks, and to supply water to the inhabitants of a district and charge rates for such supply, the amount of the capital of the undertaking was specified, and the amount of all moneys borrowed by the undertakers and "secured by mortgage of the undertaking" was not at any time to exceed a specified sum. The undertaking was assigned to a limited company formed for that purpose, and the company issued debentures whereby they "charged" their undertaking, lands, works, property and effects (both present and future) with repayment of the money borrowed, the charge being expressed to be a floating security not hindering any sale, exchange, or lease of the lands, or the receipt or payment of any moneys, or any other dealings in the course of the business of the company, but attaching to all the property for the time being, whether real or personal, of the company. By a subsequent Provisional Order further powers were conferred on the company, and they only were recognised as undertakers for the purposes of that Order. The company afterwards made default in payment of the principal moneys secured by the debentures on the day named therein for payment. In an action by debenture-holders claiming (amongst other relief) a sale of the undertaking and property comprised in the debentures as a going concern, and the appointment of a manager until sale:—*Held*, that, the waterworks undertaking being for a public purpose and not a mere private undertaking, the principle of the decision in *Gardner* v. *London, Chatham, and Dover Railway Company* (Law Rep. 2 Ch. 201) was applicable; that the debentures did not confer upon the holders of them a power to sell the undertaking; and that the Court ought not to direct a sale of the undertaking or the appointment of a manager. BLAKER *v.* HERTS AND ESSEX WATERWORKS COMPANY - 399

2. —— *Dividends—Payment of Dividend out of Capital—Wasting Property.*] Where the shares of a limited company have, under a duly registered contract, been allotted as fully paid-up shares in consideration of assets handed over to the company, it is under no obligation to keep the value of its assets up to the nominal amount of its capital, and the payment of a dividend is not to be considered a return of capital, merely on the ground that no provision has been made for keeping the assets up to the nominal amount of capital.—There is nothing in the Companies Acts to prohibit a company formed to work a wasting property, as e.g., a mine or a patent, from distributing, as dividend, the excess of the proceeds of working above the expenses of working, nor to impose on the company any obligation to set apart a sinking fund to meet the depreciation in the value of the wasting property. If the expenses of working exceed the receipts, the accounts must not be made out so as to shew an apparent profit, and so enable the company to pay a dividend out of capital, but the division of the profits without providing a sinking fund is not such a payment of dividends out of capital as is forbidden by law. —Decision of Stirling, J., affirmed. LEE *v.* NEUCHATEL ASPHALTE COMPANY - - C. A. 1

3. —— *Prospectus—Misrepresentation—Action of Deceit—Circular to correct Error in Prospectus.*] Persons took debenture stock in a company in reliance on a statement in a prospectus issued by the directors that £200,000 of share capital had been subscribed, when it had in fact only been allotted in fully paid-up shares to the contractor. £20 per cent. of the amount subscribed for was to be paid on allotment, and the rest by instalments, with an option to pay up in full on allotment and receive a discount. After allotment the directors sent to the allottees along with their stock certificates a circular which, amid statements about other matters, stated the truth as to the matter misrepresented, but did not admit the misrepresentation, nor inform the allottees that they could retire and get back their money. After this the allottees who had paid in full, received their discount, and those who had not, went on paying up the remaining £80 per cent. by instalments. The concern having proved a failure, some of the debenture stock holders sued the directors to recover damages for misrepresentation:—*Held* (affirming the judgment of Kekewich, J.), that the untrue statement in the prospectus was to be taken as inducing the allottees to enter into the contract, and entitled the allottees to damages, and that its effect was not done away with by the circular, and that the allottees who went on to pay up in full after receiving the circular could recover damages for the loss of the money paid by them after receiving it, as well as in respect of what they had paid at first.—How the case would have stood if the circular had admitted the misrepresentation and informed the allottees that they could have their money back, *quære.*—Some of the Plaintiffs were absent from illness at the trial and no evidence was given to prove their individual cases, Kekewich, J., gave judgment in favour of those Plaintiffs who proved their cases, but ordered those who did not appear to pay to the Defendants the costs occasioned by their being joined as Plaintiffs:—*Held*, on appeal, that this judgment ought to be varied as regards these

COMPANY—*continued.*

latter Plaintiffs by making it without prejudice to their bringing a fresh action. ARNISON *v.* SMITH [C. A. 348

4. —— *Shares — Director's Qualification — Shares held "in his own right."*] By a contract between the vendors of a brewery and a trustee for a limited company which was to be formed for the purchase and carrying on of the brewery, it was agreed, among other things, that B., one of the vendors, should be a managing director for a specified time, and that on his retirement or death his son, the Plaintiff, should be managing director for a term therein mentioned, and that B. should provide a qualification for his son as managing director. By the articles of association, which adopted the contract, it was provided that a director should vacate his office if he did not acquire a qualification within a month of his appointment or election. and that the qualification of a managing director should be the holding in his own right shares of the nominal value of £25,000. B. provided for the Plaintiff shares to the amount of £5000, and died in August, 1888. The Plaintiff, who was one of his executors, and his co-executors, in October, 1888, transferred shares to the amount of £20,000 into the Plaintiff's name to complete his qualification as a managing director; but the estate had not been administered, and there was no evidence under what circumstances the shares were transferred to him or whether he was beneficially entitled to them. The board of directors refused to recognise the Plaintiff as a director on the ground that he had not sufficient qualification, and he brought an action to restrain them from excluding him, and moved for an interim injunction:—*Held*—(1) that on the construction of the articles the provision that the office of a director should be vacated if he did not acquire a qualification within a month did not apply to those who were appointed managing directors under the contract; (2) that in the absence of evidence as to the beneficial interest in the shares transferred to the Plaintiff the Court could not decide whether he was the holder of the shares "in his own right" within the meaning of the articles, until the estate had been administered. Afterwards, an extraordinary meeting of the shareholders having, at the instance of the Court, been held and a resolution having been passed that even if the Plaintiff were duly qualified they did not desire him to act as a managing director, the Court declined to interfere with the decision of the shareholders, and refused the injunction.—*Pulbrook* v. *Richmond Consolidated Mining Company* (9 Ch. D. 610) considered; and the observations of Jessel, M.R., as to the meaning to be attached to shares held by a shareholder "in his own right" questioned by Cotton, L.J.—Per Cotton, L.J.: The meaning of a shareholder holding shares "in his own right" is that he must not only have the legal right to deal with them, but must have the beneficial ownership of them; although such ownership may be incumbered.—Per Lindley, L.J.: The expression has gained a practical conventional meaning, namely, that the shareholder holds them in such a way that the company may safely deal with them as his shares. BAINBRIDGE *v.* SMITH C. A. 462

COMPANY—*continued.*

5. —— *Winding-up—Costs of obtaining Special Act incorporating Company—Costs of obtaining further Special Act after Incorporation of Company—Claim by Parliamentary Agent—Promoter—Companies Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 16), *s.* 65.] The special Act incorporating a tramway company provided that the costs, charges, and expenses of and incident to the preparing, applying for, obtaining and passing of the Act should be paid by the company. The Act was obtained by a parliamentary agent, who was employed by S., a person who had taken an active part in the promotion of the company, but who was not mentioned in the Bill or in the Act, and who never became a member of the company. After the company was incorporated the parliamentary agent, either of his own accord or upon instructions from S., procured for the tramway company another Act, which contained a similar provision as to the payment of the costs, charges, and expenses of obtaining it. The seal of the company was affixed to the petition for this second Act, but without authority. The company never had any board of directors or body of shareholders capable of entering into a binding contract or of exercising any of the statutory powers, and it was ordered to be wound up shortly after the passing of the second Act:—*Held* (affirming the judgment of Chitty, J.), that the parliamentary agent was not entitled to prove against the company in the winding-up in respect of the costs, charges and expenses of either of the Acts. Those persons only who do work directly for a company in process of formation, without being employed by any one else for hire or reward, are entitled to look to the company when formed, for payment of the costs and expenses of the work of which the company has got the benefit, and those persons who are employed by any one else to do the work for hire or reward must look to the person who employed them. *In re* SKEGNESS AND ST. LEONARDS TRAMWAYS COMPANY. *Ex parte* HANLY [C. A. 215

6. —— *Winding-up—Contributory—Payment of Shares in Cash—Set-off of present Debt of Company against Liability to future Calls on Shares—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] An agreement by a shareholder in a company with the company to set off against future calls on his shares a present liability of the company to pay cash to him, is payment of the calls in cash within the meaning of sect. 25 of the Companies Act, 1867.—*Kent's Case* (39 Ch. D. 259) distinguished. *In re* JONES, LLOYD & CO., LIMITED [159

7. —— *Winding-up Petition—Withdrawal—Costs.*] There is no general rule that when a petition for the winding-up of a company is withdrawn by the petitioner, shareholders and creditors appearing, whether to support or oppose the petition, are entitled to separate sets of costs. The Court, in the exercise of its discretion, will have regard to the circumstances of each particular case. Where a winding-up petition was withdrawn by the petitioners, in consequence of an arrangement made between them and the company for securing payment of the petitioners' debt, shareholders appearing to oppose were allowed

COMPANY—*continued.*
one set of costs only. *In re* CRITERION GOLD MINING COMPANY - - - - 146
—— Out of jurisdiction—Service on - 542
See PRACTICE. 9.
COMPENSATION—Mistake in particulars—First and second mortgagees - - 573
See MORTGAGE. 4.
—— Mistake as to title of lessor - - 103
See LANDLORD AND TENANT.
CONTRARY INTENTION - - - 417
See POWER. 1.
CONTRIBUTORY - - - - 159
See COMPANY. 6.

COPYHOLD—*Estate Tail—Effect of Enfranchisement in barring Entail.*] The tenant in tail in possession of copyhold land (held of a manor by the custom of which an entail could be created) devised all the real estate of or to which he should be seised or entitled at the time of his death to two trustees, their heirs and assigns, upon certain trusts declared by the will. After the death of the testator the trustees were, as such devisees, admitted tenants of the copyhold land, to hold the same to them, their heirs and assigns, upon the trusts of the will. The lord of the manor afterwards executed an enfranchisement (not under the Copyhold Acts) to the trustees, and they executed a conveyance to the only daughter of the testator (who was his heiress in tail) in fee. Under the trusts of the will the daughter had become solely beneficially entitled to the real estate which passed under the devise to the trustees:—*Held*, on the authority of *Challoner* v. *Murhall* (2 Ves. 524) and *Dunn* v. *Green* (3 P. Wms. 9), that the effect of the enfranchisement, and the subsequent conveyance by the trustees, was to bar the entail, and make the daughter owner of the land in fee simple. *Ex parte* SCHOOL BOARD FOR LONDON. *In re* HART - - - 547
COSTS—Interest on—Mortgage suit - 537
See MORTGAGE. 2.
—— Originating summons - - 476
See PRACTICE. 7.
—— Security for - - - - 118
See PRACTICE. 8.
—— Set-off—Separate action - - 518
See PRACTICE. 4.
—— Taxation—Higher or lower scale - 494
See SOLICITOR. 4.
—— Winding-up of company - - 215
See COMPANY. 5.
—— Winding up petition—Withdrawal - 146
See COMPANY. 7.
COVENANT—For quiet enjoyment - 88
See LANDLORD AND TENANT. 2.

DEBENTURE - - - - 399
See COMPANY. 1.
DECEIT—Action for - - - 348
See COMPANY. 3.
DIRECTOR—Qualification - - - 462
See COMPANY. 4.
DISCOVERY - - - - - 151
See PRACTICE. 6.
DISCRETION—Court—Refusal to register trade-mark - - - - 278
See TRADE-MARK. 2.
DISTRIBUTION—Statute of—Leaseholds—Domiciled Scotchman - - - 394
See DOMICIL.
DIVIDEND—Payment out of capital - 1
See COMPANY. 2.
DOMICIL—*Intestacy—Lex Loci—Leaseholds—Bequests invalid by English Law—Devolution of English Leaseholds belonging to domiciled Scotchman.*] Leaseholds in England, belonging to a domiciled Scotchman, devolve, in case of his intestacy, upon the persons entitled according to the English Statute of Distributions. DUNCAN *v.* LAWSON - - - - - 394

ECCLESIASTICAL COURT—Jurisdiction 507
See CHURCH.
ENFRANCHISEMENT—Copyhold—Estate tail [547
See COPYHOLD.
ENTAIL—Copyhold—Enfranchisement 547
See COPYHOLD.
EVIDENCE—Appeal—Fresh evidence - 98
See PRACTICE. 3.
—— Onus of proof - - - - 248
See LANDLORD AND TENANT. 1.
—— Onus of proof - - - - 268
See LIGHT.

FORECLOSURE—Accounts—Costs—Interest 537
See MORTGAGE. 2.

GENERAL ORDER, August, 1882, r. 2 (b), (c) Sched. I, Pt. 2. - - - 381
See SOLICITOR. 3.
GUARDIAN—Infant—Child of alien - 310
See ALIEN.
GUARDIAN AD LITEM - - - 415
See PRACTICE. 5.

HARBOUR BONDS—Interest in land—Mortmain [168
See CHARITY.
HEIRLOOMS—Will—Revocation by codicil 64
See WILL. 1.
HUSBAND AND WIFE—Separate estate—Testamentary appointment - - 568
See POWER. 2.

INFANT—Child of alien—Guardian - 310
See ALIEN.
INJUNCTION—Way through churchyard—Jurisdiction - - - - 507
See CHURCH.
INTEREST—Costs in mortgage suit - 537
See MORTGAGE. 2.
—— Mortgage—Proviso for reduction - 388
See MORTGAGE. 3.

JURISDICTION—Amendment after judgment 28
See PRACTICE. 10.

JURISDICTION—*continued.*

—— Discovery—Foreign action - - 151
See PRACTICE. 6.

—— Guardian of infant—Child of alien - 310
See ALIEN.

—— Way through churchyard—Injunction 507
See CHURCH.

LAND—Interest in—Mortmain - - 168
See CHARITY.

LANDLORD AND TENANT—*Building Agreement—Separate Leases—Agreement for Lease—Power of re-entry—Rent in Arrear—Appropriation of Payments—Onus of Proof—Leave to amend.*] By a building agreement it was stipulated that as soon as R. should have roofed-in the houses to be erected by him on certain plots of ground belonging to H., H. would grant and R. would accept a separate lease for ninety-nine years, at the rent therein mentioned, of each house when and so soon as the roof was completed, and the plot of ground on which it stood; the leases to be in the form of a draft annexed to the agreement. There was a proviso that the lessor "in respect of any of the plots not previously demised," might re-enter, in the event of the rent being in arrear for twenty-one days, or if at any time the works were not regularly proceeded with for twenty-one days. The form of lease contained a covenant to complete the house within a certain period, and a proviso for re-entry on nonpayment of rent, or breach of covenant, but no power of re-entry was given if the works were not proceeded with for twenty-one days. In June, 1887, R. assigned to L. the benefit of the agreement as to four houses which he had roofed-in. R. died in July, 1887, and after his death building operations stopped for more than twenty-one days. In October, 1887, L. brought his action to compel H. to grant leases. H., by his defence, denied the right of L. to leases, on the grounds that the works had been stopped for more than twenty-one days, and that rent was in arrear:—*Held*, that as soon as R. had roofed-in a house he was entitled to claim and bound to accept a lease of it, and that his rights and liabilities were the same as if the lease had been granted, and he no longer held the house on the terms of the building agreement, but on the terms of the draft lease, and that as the draft contained no power of re-entry on work being discontinued for twenty-one days, that discontinuance, which did not take place till after the right to a lease had accrued, did not affect that right.—The only evidence on the question whether the rents were in arrear was a statement of account which upon R.'s death H. sent to his administratrix, and the items in which were admitted to be correct. H. had lent considerable sums to R., who also had become indebted to him to a considerable amount for rent. R. had paid on account sums amounting to many times more than the amount of rents, but H. appropriated most of them to the loan account, so as to shew R. largely indebted on the rent account:—*Held*, that it lay upon H. to shew that R. had not appropriated a sufficient part of his remittances to payment of rent, and that as H. had not shewn this, he had not made out that rent was in arrear.—*Held*, therefore (affirming the judgment of Kekewich, J.), that L. was entitled to have the leases granted.—L. by his statement of claim alleged that the houses were roofed-in by March, 1887, and H. did not by his defence traverse this statement. The evidence at the trial shewed that the main buildings of the houses were completely roofed-in before June, 1887, but the flat wooden roofs of some annexes had up to the time of trial not been covered with zinc. H. then applied for leave to amend his defence, that he might contend that the buildings had not been roofed-in within the meaning of the agreement.—Kekewich, J., refused leave, and *held* that H. must be bound by his admission on the pleadings, and that the evidence must be disregarded.—*Held*, on appeal, that as H. had been almost constantly on the property about the time of R.'s death, and had been perfectly aware of the state in which it was, he ought not now to be allowed to amend for the purpose of taking this point, which he had not thought fit to raise on the pleadings.—*Held*, also, that the evidence did not shew the houses not to be roofed-in within the meaning of the agreement. LOWTHER *v.* HEATHER C. A. 248

2. —— *Covenants—Implied Agreement for quiet Enjoyment—Nuisance—Derogation from Grant.*] If a person carries on upon his property some process which is in itself noxious, a neighbour may be entitled to restrain him from carrying it on so as to cause damage to him; but if the process is not in itself noxious, it cannot be complained of as a nuisance unless it interferes with the ordinary enjoyment of life or the ordinary use of property.—A landlord who lets part of his property for the purpose of a particular trade, is not to be taken as having entered into an implied contract precluding him from a reasonable and ordinary use of the remainder, on the ground that such use injures a particular class of his tenant's goods, it not having been known to him at the letting and not being a matter of common knowledge that that particular class of goods was liable to be so injured, nor is such user by the landlord a breach of his covenant for quiet enjoyment.—A landlord let a floor to a tenant for a paper warehouse, retaining the cellar immediately below. He afterwards commenced in the cellar a manufacture which required the air to be hot and dry, and employed a heating apparatus. This raised the temperature on the floor of the tenant's room to about 80°, but the general air of the room was never nearly so high, and it did not appear that the workpeople were inconvenienced. The tenant sued to restrain the landlord from heating the cellar, on the ground that the heat dried his brown paper and made it less valuable, though it was not such a heat as would injure paper generally. The landlord did not know at the time of the letting that the tenant was going to store any particular kind of paper which was liable to be deteriorated by a heat which would not hurt paper generally:—*Held*, that the landlord was not liable either on the ground of nuisance or of implied agreement for quiet enjoyment.—*Cooke* v. *Forbes* (Law Rep. 5 Eq. 166) considered. ROBINSON *v.* KILVERT - - - C. A. 88

3. —— *Mistake as to Lessor's Title—Compensation.*] L., a leaseholder, believing that her

LANDLORD AND TENANT—*continued.*
term had thirty years to run, agreed in writing with C. to grant him a lease for twenty-one years, nothing being said about compensation for misdescription. C. did not investigate the title, but took an underlease for twenty-one years. In the following year he discovered that L.'s term had only about fourteen years to run, and he claimed compensation. L. offered to grant a fresh lease for the residue of the term less three days, but declined to give compensation. C. thereupon brought his action for rectification of the lease and compensation:—*Held* (affirming the decision of Kekewich, J.), that as the compensation was claimed in respect of a defect of title which C. might have discovered before he took his lease, and there was no contract as to compensation, he was not entitled to compensation after taking it.—*Besley* v. *Besley* (9 Ch. D. 103) approved, and held not to be overruled by *Palmer* v. *Johnson* (13 Q. B. D. 351), which turned on an express agreement for compensation. CLAYTON *v.* LEECH [C. A. 103

LANDS CLAUSES ACT—Taxation of costs 494
See SOLICITOR. 4.

LEASE—Agreement for - - - 248
See LANDLORD AND TENANT. 1.

LEASEHOLD—Statute of Distributions—Domiciled Scotchman - - - 394
See DOMICIL.

LIGHT—*Prescription—Fluctuating Interruption—Onus of Proof—Prescription Act* (2 & 3 *Wm.* 4, *c.* 71), *ss.* 3, 4.] In an action for an injunction or damages for interference with the ancient lights of the Plaintiffs' house by raising an old party wall fifteen feet above its original height, the Defendant pleaded that he had for several years been in the habit of piling up empty packing-cases against the wall to a height exceeding the new wall. The evidence was conflicting as to the minimum height of the pile of packing-cases, and as to the time they remained there, but it was proved that they were removed from time to time, some to be returned to the owners, and the rest to be broken up:—*Held* (reversing the decision of North, J.), that there had been no interruption of the Plaintiffs' enjoyment of light within the 4th section of the Prescription Act, and that the Plaintiffs were entitled to an inquiry as to damages.—*Per* Cotton and Lindley, L.JJ.: *Semble*, if in an action for obstruction of light it appears on the plaintiff's evidence that there has been some interruption, which in its nature is permanent, the onus is on the plaintiff of proving that such interruption did not in fact continue with his acquiescence for a year; but if the interruption is in its nature fluctuating and temporary, the onus of proving that it in fact continued and was acquiesced in by the plaintiff for a year, lies on the defendant. PRESLAND *v.* BINGHAM [C. A. 268

LOCAL BOARD - - - - - 52
See LOCAL GOVERNMENT ACTS.

LOCAL GOVERNMENT ACTS—*Local Board—Arbitration—Umpire—Time for making Award—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 180, *sub-s.* 9.] Although no original limit of time is specially mentioned in the Public Health Act, 1875, within which an umpire must make his award, yet by analogy to the original limit fixed in the case of arbitrators, an original limit of twenty-one days from the date of the reference to him must be inferred to have been fixed in the case of an umpire; which, under sect. 180, sub-sect. 9, may not be extended beyond two months. Two arbitrators appointed under the Public Health Act, 1875, met on the 3rd of January, and extended the time for making their award till the 20th of February. On the 10th of January they appointed an umpire. On the 1st of February the arbitrators and umpire met, and were attended by the parties, but one of the arbitrators retired and refused to proceed any further, and the meeting was adjourned *sine die*. On the 19th of April the umpire made his award:—*Held* (reversing the decision of Kay, J.), that the award was made too late, and must be set aside:—*Held*, also, that the date from which the twenty-one days must be reckoned was the 1st of February, when the arbitrators finally disagreed, and not the 20th of February when their powers expired. *In re* YEADON LOCAL BOARD AND YEADON WATERWORKS COMPANY - - - - - C. A. 52

MISTAKE—Correction of—Misrepresentation in prospectus - - - - 348
See COMPANY. 3.

—— Lessor's title - - - - 103
See LANDLORD AND TENANT. 3.

—— Payment of legacy into Court—Negligence
See SOLICITOR. 5. [178

MORTGAGE — *Commission — Bonus — Collateral Advantage—Fraud—Redemption Action—Account—Second Mortgagee Plaintiff—Equities of Mortgagor.*] Where advances have been made by a mortgagee to a mortgagor upon security of a speculative character, such as a building estate, the Court will, in taking the account in a redemption action, allow to the mortgagee sums actually deducted by him for commission or bonus at the times of making the advances, provided the deductions were made as part of the mortgage contract, under a bargain deliberately entered into by the parties while on equal terms and knowing perfectly well what they were doing, and without any improper pressure, unfair dealing, or undue influence on the part of the mortgagee: the Court treating the transaction in each case as amounting in fact to the payment of the whole amount of the advance to the mortgagor and the return of a certain part of it to the mortgagee as a consideration for the accommodation.—*Potter* v. *Edwards* (26 L. J. (Ch.) 468) followed.—*Broad* v. *Selfe* (11 W. R. 1036) and *James* v. *Kerr* (40 Ch. D. 449) discussed.—In a redemption action by a second mortgagee against the first mortgagee, the account to be taken at the instance of the second mortgagee must be taken in all respects as though it were being taken at the instance of the mortgagor himself; and the second mortgagee may assert such equity as the mortgagor himself might have had to exclude any particular item from the account. MAINLAND *v.* UPJOHN - - 126

2. —— *Foreclosure—Practice—Accounts—Costs—Adding Costs to Security—Interest on Costs.*] A

MORTGAGE—*continued.*
mortgagee is not entitled, in carrying in his accounts under a foreclosure judgment, to charge interest on his taxed costs unless they are directed to be added to his security, and then they carry interest from the date of the Taxing Master's certificate, and not from the date of the judgment. An action by a mortgagor against a mortgagee to set aside the mortgage having been dismissed with costs, which were ordered to be paid by the Plaintiff to the Defendant, judgment was given for foreclosure on the Defendant's counterclaim, and an account was directed of what was due to the Defendant for principal, interest (the mortgage reserving 5 per cent.), and the taxed costs of the action. On appeal the judgment was affirmed with costs, the Court of Appeal giving the Defendant leave to add the taxed costs of the appeal to his security.—In carrying in his accounts the Defendant charged the Plaintiff with interest at 4 per cent. on the taxed costs under the original judgment from the date of the judgment, and also interest at 4 per cent. on the taxed costs of the appeal from the date of the judgment of the Court of Appeal:—*Held*, that no interest on the costs under the original judgment could be charged by the Defendant, the mortgagee; but that, as to the costs of the appeal, interest at 4 per cent. was chargeable, though only from the date of the Taxing Master's certificate, and not from the date of the judgment of the Court of Appeal.—*Lippard v. Ricketts* (Law Rep. 14 Eq. 291) considered. EARDLEY *v.* KNIGHT - - - 537

3. —— *Mortgagee in possession—Proviso for Reduction of Interest—Accounts—Right to higher Rate of Interest.*] A proviso in a mortgage for reduction of interest on punctual payment does not apply to the case of the mortgagee taking possession and receiving the rents, whether he does so by arrangement with the mortgagor or otherwise; and accordingly the mortgagee will be allowed, in his accounts as mortgagee in possession, the higher rate of interest, even though there was no interest in arrear at the time of taking possession. BRIGHT *v.* CAMPBELL 388

4. —— *Sale—Incorrect Particulars—Compensation—Liability—Mistake by Agent.*] The particulars on a sale by mortgagees stated that the roads on the property were kerbed; this was not accurate, and the vendors declined to complete without compensation. The sale was completed, compensation being allowed:—*Held*, that as against a second mortgagee the first mortgagees were liable for the mistake, and in taking the account must be charged with the sum allowed as compensation. TOMLIN *v.* LUCE - 573

—— Power of sale—Conveyancing Act—Debenture - - - - - 399
See COMPANY. 1.

—— Trustee—Insufficient security - 476
See TRUSTEE.

MORTGAGEE—Consent of—Settled Land Act—Sale - - - - - 375
See SETTLED LAND ACT.

—— In possession—Proviso for reduction of interest - - - - 388
See MORTGAGE. 3.

MORTMAIN - - - - - 168
See CHARITY.

NATURALIZATION—Alien—Infant children 310
See ALIEN.

NEGLIGENCE—Solicitor—Action for - 178
See SOLICITOR. 5.

—— Solicitor—Counter-claim for - 323
See SOLICITOR. 1.

NEGOCIATIONS—For lease—Remuneration of solicitor - - - - 381
See SOLICITOR. 3.

NUISANCE—Covenant for quiet enjoyment 88
See LANDLORD AND TENANT. 2.

PARISH CHURCH - - - - 507
See CHURCH.

PARLIAMENTARY AGENT—Costs of - 215
See COMPANY. 5.

PARTICULARS OF OBJECTION—Patent suit [109
See PATENT.

PARTIES—Adding Plaintiff - - 341
See PRACTICE. 1.

—— Originating summons - - 476
See PRACTICE. 7.

PATENT—*Practice—Validity of Patent—Particulars of Objections—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 29.] In an action for infringement of a patent the Defendants disputed the validity of the patent on the grounds of want of novelty and anticipation, and delivered particulars of objections, in which they referred to about twenty specifications, stating that in each case they relied on the whole specification, and to passages, some of them of considerable length, in above twenty books. The Plaintiff applied for better particulars. Stirling, J., ordered the Defendants to deliver better particulars as to the specifications, but made no order as to the extracts from books:—*Held*, on appeal, that the Defendants must be ordered to strike out from their particulars all the publications on which they relied simply as proving the state of general public knowledge at the time when the patent was granted to have been such that there was no invention in the patented process; and that, as regarded alleged anticipations, they must state the nature of the anticipations on which they relied, and point out distinctly, though not necessarily by page and line, where such anticipations were to be found. HOLLIDAY *v.* HEPPENSTALL BROTHERS - - - - C. A. 109

—— Practice—Third parties—Costs - 28
See PRACTICE. 10.

PAYMENT—Appropriation of - - 248
See LANDLORD AND TENANT. 1.

PENDING BUSINESS—Solicitors' Remuneration Act - - - - - 494
See SOLICITOR. 4.

POWER—*Appointment—Exercise by Will—Contrary Intention—Wills Act* (1 *Vict. c.* 26), *s.* 27.] P., by a voluntary settlement, dated in 1880, directed his trustees to invest and deal with the trust premises in such manner in all respects as he should from time to time order and direct by any

POWER—*continued.*

writing (but not by his last will, unless he should expressly refer to the trust premises), and subject to such trust to stand possessed of the funds upon trusts in favour of R. and her children. P., by his will, dated in 1879, gave and bequeathed all his leasehold estates and personal estate and effects whatsoever and wheresoever to his executors upon trusts in favour of other persons than R.:—*Held*, having regard to the terms of the settlement, that the power was not exercised by the will.—*In re Marsh* (38 Ch. D. 630) distinguished. *In re* PHILLIPS. ROBINSON *v.* BURKE - - 417

2. —— *Married Woman — Direction to her Executors to pay Debts—Appointment to the Persons named as Executors upon Trusts—Debts so called charged on appointed Property.*] A married woman who died in 1880 entitled for her life, for her separate use, without power of anticipation, to the income of certain estate, with a general testamentary power of appointing the same estate, by her will directed her executrixes thereinafter named to pay her just debts, and by virtue of the power appointed, devised, and gave the same estate unto two daughters, whom she appointed executrixes, upon certain trusts for the benefit of her children equally for life, and after the death of the survivor for the benefit of her grandchildren equally. In an administration action the Chief Clerk certified that the testatrix was indebted at the time of her death to several persons:—*Held*, that the debts, so called, were a charge upon the appointed property.—*In re Tanqueray-Willaume and Landau* (20 Ch. D. 465) applied to the case of a married woman's will. *In re* DE BURGH LAWSON. DE BURGH LAWSON *v.* DE BURGH LAWSON - - - - - 568

PRACTICE — *Amendment — Adding Plaintiff — Rules of Supreme Court, 1883, Order XVI., r. 2.*] A Plaintiff claimed an injunction or damages against the Defendant for an alleged violation of a covenant restraining her from building in a particular manner. After the commencement of the action the Plaintiff was advised that there was something in her title which might act as a personal bar to her obtaining relief; and she accordingly applied for leave to amend by making the owner of a neighbouring house, who, she alleged, was entitled to the benefit of the same covenant, a co-Plaintiff:—*Held* (reversing the decision of North, J.), that, as the real question was the effect of the covenant, the amendment ought to be allowed.—*Walcott* v. *Lyons* (29 Ch. D. 584) distinguished. AYSCOUGH *v.* BULLAR - C. A. 341

2. —— *Amendment at Trial—Rules of Supreme Court, Order XXVIII., r. 1.*] An action was brought for the recovery of furniture wrongfully removed and damages. Judgment had been obtained by the Plaintiffs for the wrong now complained of against other persons in another action. There was some evidence of acts done since the writ in the former action which might raise a fresh cause of action. After the evidence for the Plaintiffs and one Defendant was closed, the Court refused to allow the Defendants to amend by pleading merger of cause of action in the judgment, because that would in justice require that the Plaintiffs should also be allowed to new assign and adduce fresh evidence. EDEVAIN *v.* COHEN - 563

PRACTICE—*continued.*

3. —— *Appeal—Leave to adduce fresh Evidence on Appeal—Rules of Supreme Court, 1883, Order LVIII., r. 4.*] Fifty-two persons who had severally taken debenture stock in a company sued the directors to recover damages on the ground that the stock was worthless, and that they had been respectively induced to take it by a prospectus containing gross misrepresentations. Forty of them appeared at the trial and gave evidence, the other twelve were not present, and no evidence was given on their behalf. An adjournment was asked for, but refused, there being no evidence to shew why they were not present. Judgment was given for the forty with costs, but the twelve were ordered to pay the costs occasioned to the Defendants by their being joined as co-Plaintiffs. The twelve appealed, and nine of them now applied that they might be allowed to attend and give evidence at the hearing of the appeal, on the ground that at the time of the trial six of them had been too ill to attend, another had been abroad, another travelling so as not to receive notice of the trial, and another had been called away to nurse a sick friend:—*Held*, that no special circumstances were shewn sufficient to induce the Court to make the order, for that the Plaintiffs' solicitor ought to have kept up communication with his clients so as to be able to bring them forward at the trial, or produce such evidence of their inability to attend as would have enabled him to obtain an adjournment.—Whether Order LVIII., rule 4, is applicable where the party asking for leave to adduce evidence before the Court of Appeal has adduced no evidence at all in the Court below, *quære*. ARNISON *v.* SMITH - - - - - C. A. 98

4. —— *Costs—Set-off—Solicitor's Lien—Separate Actions—Appeal Costs—Rules of Supreme Court, 1883, Order LXV., r. 14.*] The Plaintiff in a patent action brought a separate trade-mark action against the same Defendant. An appeal by the Plaintiff from the judgment in the patent action was dismissed with costs. Under an order in the trade-mark action certain costs in that action were ordered to be paid by the Defendant to the Plaintiff. The Defendant in the patent action having issued execution for the costs of the appeal in that action, the Plaintiff paid the same to the sheriff under protest. The Plaintiff in that action then moved, under Rules of Supreme Court, 1883, Order LXV., r. 14, that, notwithstanding a lien claimed by the Defendant's solicitor on the costs ordered to be paid by him, the Plaintiff, on the appeal, he might set off against those costs the costs ordered to be paid to him in the trade-mark action, as well as certain costs in the patent action, which, prior to the appeal in that action, had been ordered to be paid to him by the Defendant:—*Held* (following *Edwards* v. *Hope* (14 Q. B. D. 922)), that Order LXV., r. 14, applied only to costs in the same action, and not to costs in different actions; and that, accordingly, the Plaintiff's right to set off his costs in the trade-mark action against the appeal costs in the patent action was intercepted by the solicitor's lien; but that his right of set-off as to the costs in the patent action only was not so intercepted. BLAKEY *v.* LATHAM - - - - - 518

PRACTICE—*continued.*

5. —— *Guardian ad litem—Co-Defendants—Rules of Supreme Court*, 1883, *Order XIII., r.* 1.] A guardian *ad litem* to a defendant may, under circumstances rendering it necessary, be appointed at the instance of a co-defendant by analogy to rule 1 of Order XIII. of the Rules of Supreme Court, 1883. *In re* DAWSON. JOHNSTON *v.* HILL [415

6. —— *Jurisdiction — Discovery — Foreign Action—Discovery in aid.*] The Court will not entertain an action for discovery only in aid of proceedings in a foreign Court.—*Bent* v. *Young* (9 Sim. 180) considered and followed.—*Crowe* v. *Del Rio* (9 Sim. 185, n.) observed upon. DREYFUS *v.* PERUVIAN GUANO COMPANY - - 151

7. —— *Originating Summons — Inquiries—Directions—Administration not asked—Service—Parties — Trustees — Beneficiaries, Absence of—Costs—Jurisdiction — Rules of Supreme Court*, 1883, *Order LV., r.* 3 (*g*), *r.* 5; *Order LXV., r.* 1—*Costs of Shorthand Note of Judgment.*] An originating summons under Rules of Supreme Court, 1883, Order LV., rule 3, for inquiries or directions, without administration, is equivalent to the old Chancery practice of commencing an administration suit, raising the particular point by the pleadings, obtaining an inquiry or direction upon that point, and then staying further proceedings. Accordingly, upon such a summons, the Court has jurisdiction, provided it has proper parties before it under rule 5, to deal with the question of costs although no estate or fund is sought to be administered: and if the summons has been taken out by trustees, they are precisely in the same position, as regards their right to costs under Order LXV., rule 1, as if it were an ordinary action for administration.—An originating summons was taken out under Order LV., rule 3 (*g*), by one of the three trustees of a will against his co-trustees to determine whether the trustees ought to call in certain mortgages on which the testator's residuary estate had been invested. One of the Defendants was also tenant for life or widowhood of part of the residue, and the other was beneficially entitled absolutely to a moiety of the residue. The person beneficially entitled to the other moiety, a daughter of the testator, was not a party to the summons, but the Plaintiff and one of the Defendants were two of the three trustees of her marriage settlement which comprised her moiety:—*Held*, by North, J., that the Court had jurisdiction, notwithstanding the summons did not ask for administration, to direct an inquiry what the trustees ought to do with regard to the calling in of the mortgages, but had no jurisdiction to make any order as to costs, all the persons interested in the trust estate not being before the Court:—*Held*, on appeal, that the summons had been properly taken out under Order LV., rule 3 (*g*), and that under rule 5 a sufficient number of the persons beneficially interested in the estate had been served to give the Court the same jurisdiction as to costs as in an ordinary administration action, though the Court had power, if it thought fit, to require any other persons to be served before deciding the question of costs: and that the Judge below ought to have exercised his discretion as to costs under Order LXV., rule 1, by reserving them, as in an administration action, until the inquiry directed had been answered.—Order of North, J., accordingly varied by reserving liberty to any of the parties to apply in Chambers as to costs or otherwise.—In the absence of any direction to the contrary the costs of an appeal carry the costs of the shorthand writer's notes of the judgment of the Court below. *In re* MEDLAND. ELAND *v.* MEDLAND - - C. A. 476

8. —— *Security for Costs—Judgments Extension Act*, 1868 (31 *&* 32 *Vict. c.* 54)—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 76—*Rules of Supreme Court*, 1883, *Order XLII., r.* 24—*Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 122.] *Held*, by North, J., that security for costs will not be required of the plaintiff in an action in any Division of the High Court who is resident in Scotland or Ireland, inasmuch as the judgment can be enforced in Scotland or Ireland, but that an order made on a claim in a winding-up is not a judgment enforceable in Scotland or Ireland under the Judgments Extension Act, 1868, and therefore a claimant in a winding-up resident in Scotland must give security for costs.—*In re Vanderhaege* (20 Q. B. D. 146) discussed.—On appeal the Claimant adduced evidence that he had a large amount of property in England available for costs, and the order for security was discharged, the Court declining to give any opinion on the questions, whether an order in a winding-up can be enforced in Scotland or Ireland under the Judgments Extension Act, 1868, or whether, having regard to the Companies Act, 1862, s. 122, a claimant in a winding-up who resides in Scotland or Ireland ought to be ordered to give security. *In re* HOWE MACHINE COMPANY. FONTAINE'S CASE - - - - - - C. A. 118

9. —— *Service out of Jurisdiction—Injunction—Sequestration—Rules of Supreme Court*, 1883, *Order XI., r.* 1, *sub-s.* (*f*), *r.* 2.] In an action to restrain the infringement of the Plaintiff's registered trade-mark, the Defendants being a company having their registered office at Glasgow, with branches in London, Manchester, and Hull, leave to serve the writ out of the jurisdiction was given, as an injunction could be enforced by sequestration against the property of the company in England.—*Marshall* v. *Marshall* (38 Ch. D. 339) discussed and distinguished. *In re* BURLAND'S TRADE-MARK. BURLAND *v.* BROXBURN OIL COMPANY - - - - - - - - 542

10. —— *Third Parties—Action for Infringement of Patent—Application by Plaintiffs, after Judgment on Appeal, to amend by making Third Parties Defendants—Costs as against Third Parties—Rules of Supreme Court*, 1883, *Order XVI., r.* 48, 49, 52, 53, 54.] Defendants to an infringement action served a third-party notice for indemnity upon the B. company, who were not parties to the action. The B. company appeared as third parties in the action, and admitted their liability to the Defendants; and the Court ordered that they should have liberty to appear at the trial, and should be bound by the decision of the Court on any question as to the indemnity arising between them and the Defendants, but not otherwise. The B. company were not made defendants, and filed no pleadings, but they appeared at the trial as third parties, and the Court gave

PRACTICE—*continued.*

judgment partly in favour of the Plaintiffs and partly in favour of the Defendants; but made no special order as to the third parties.—The Plaintiffs appealed, and after judgment had been given allowing their appeal with costs against the Defendants, the Plaintiffs asked for an injunction and costs against the third parties (who had appeared on the appeal), and, if necessary, for an order to amend so as to make them defendants:—*Held*, by Cotton, L.J., that the Court had no jurisdiction to give a judgment against these third parties as if they were defendants, and that it would be wrong after judgment on appeal to grant liberty to amend so as to enable the Court to give relief against the third parties which was not asked for at the trial.—*Held*, by Lindley, L.J., that the Court had jurisdiction to grant the liberty to amend applied for, but that it should not be exercised in the present case, and—*Held*, by the Court (Cotton and Lindley, L.JJ.), that under Order XVI., rule 54, the Court had jurisdiction to order the third parties to pay the costs both of the appeal and below, and that as the third parties had in reality fought the Plaintiffs and failed, an order for the payment of such costs must be made against them as well as against the Defendants. EDISON & SWAN UNITED ELECTRIC LIGHT COMPANY v. HOLLAND - - - - C. A. 28

—— Counter-claim—Action by solicitor for costs *See* SOLICITOR. 1. [323

—— Leave to amend - - - 248
See LANDLORD AND TENANT. 1.

—— Mortgage suit—Accounts—Costs - 537
See MORTGAGE. 2.

—— Patent suit - - - - 109
See PATENT.

PRESCRIPTION — Light—Fluctuating interruption - - - - - - 268
See LIGHT.

PRINCIPAL AND AGENT—*Contract by Agent—Ratification—Withdrawal by the other Party before Ratification.*] An offer of purchase was made by the Defendant to S., who was the agent of the Plaintiffs, but was not authorized to make any contract for sale. The offer was accepted by S. on behalf of the Plaintiffs. The Defendant withdrew his offer, and after the withdrawal the Plaintiffs ratified the acceptance of the offer by S. In an action by the Plaintiffs for specific performance of the contract:—*Held* (affirming the decision of Kekewich, J.), that the ratification by the Plaintiffs related back to the acceptance by S., and therefore the withdrawal by the Defendant was inoperative, and the Plaintiffs were entitled to specific performance.—The fact that a simple acceptance of an offer contains a statement that the acceptor has instructed his solicitor to prepare the necessary documents does not render the acceptance a conditional acceptance.—*Crossley* v. *Maycock* (Law Rep. 18 Eq. 180) approved. BOLTON PARTNERS *v.* LAMBERT - - C. A. 295

PRINCIPAL AND SURETY—*Release of Surety—Time given to Principal Debtor.*] In order that the giving of time by a creditor to his principal debtor without the consent of a surety for the debt may have the effect of releasing the surety, there must be a binding contract to give time capable

PRINCIPAL AND SURETY—*continued.*

of being enforced, and the contract must be with the principal debtor. If the contract is made with a third party, for instance with a co-surety, the surety will not be released.—On the 4th of December, 1872, a deed was executed by a coal company of the first part; six sureties of the second part; and the company's bankers of the third part; whereby the company and the sureties jointly and severally covenanted with the bank to pay to the bank on demand the balance (not exceeding £25,000) for the time being due from the company to the bank on their current account, with interest, &c.—In January, 1876, there was about £26,000 due by the company to the bank, and one H. agreed to pay off £15,000 of the debt to the bank, on the terms contained in a deed dated the 11th of January, 1876, to which the bank, the company, the six sureties, and H. were parties. The deed contained recitals to the effect that H had agreed at the request of the company to advance them £15,000, and to pay it to the bank in reduction of the company's balance, on the terms that he should have a first charge on certain deeds deposited by the company with the bank and on the property to which they related, in priority to the claim of the bank for the surplus of the balance due to them, but without any right to claim on the sureties in respect of his advance. And it was declared by the deed that, in consideration of the £15,000, the bank were to hold the documents and property in trust, in the first place, to secure the £15,000 to H., and, subject thereto, in trust to secure to the bank the balance, not exceeding £10,000, for the time being due to them on their account current with the company, and that the deed of the 4th of December, 1872, and any covenant and provision therein contained for the benefit of the bank, save so far as the same bound or imposed any burden on the sureties as sureties, should enure for H.'s benefit, so as to be a security for the £15,000 and interest in priority to any claim on the bank; provided always, that nothing in the deed contained should operate to charge the sureties, or any of them, with the payment to H. of the £15,000, or any part thereof, or any interest thereon, the liability of the sureties for the payment of the £15,000 and interest being thereby expressly negatived:—*Held*, that this deed did not reduce the liability of the sureties to the bank below the original limit of £25,000 as regarded any balance which might thereafter become due from the company to the bank. On the 29th of November, 1880, the following document, addressed to the bank, was executed by three of the six sureties and one L.: "In consideration of your continuing or giving an account, credit, or accommodation" with or to the company "for one year from the date hereof, we the undersigned do hereby jointly and severally guarantee to you the due payment of all moneys and liabilities which are or have been or shall from time to time be owing to or incurred by you on account of the said company, it being agreed that not more than £8000 shall be ultimately recoverable hereunder; the liability of the undersigned (three original sureties) respectively hereunder shall not exceed £2500, and the liability of L. hereafter shall not exceed £500; this shall be a continuing security until a notice in writing under